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VOLUME 1

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 131

MARGARET L. HOLT, ET AL., PETITIONERS,

vs.

ALLEGHANY CORPORATION, ET AL.

No. 132

MARGARET L. HOLT, ET AL., PETITIONERS,

vs.

ALLAN P. KIRBY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONS FOR CERTIORARI FILED MAY 12, 1965
CERTIORARI GRANTED JUNE 1, 1965

SUPREME COURT OF THE UNITED STATES

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No. K-213—Minutes of Annual Meeting of Stockholders of Alleghany Corporation held in Baltimore, Maryland, May 3, 1950	2519	1855
No. K-215—Excerpt from minutes of meeting of Board of Directors of Alleghany Corporation, held on May 18, 1950 with certificate of secretary	2525	1862
No. K-221—Letter from Allan P. Kirby to Mr. Robert R. Young, dated March 14, 1949	2528	1868

	Original	Print
Record from the United States District Court for the Southern District of New York (60 Civ. 3511)—Continued		
Defendant Kirby Exhibits—Continued		
No. K-222—Memorandum to Alleghany Corporation Board of Directors from Robert R. Young, dated April 19, 1949	2530	1870
No. K-231—Letter from R. W. Purcell to H. K. Bradford, IDS, dated June 16, 1949	2535	1878
No. K-240—Memorandum from Charles Shipman to Mr. Young, dated August 16, 1949	2537	1881
No. K-241—Memorandum, dated November 29, 1949 by H. K. Bradford, Re: Securities and Exchange Commission Conference	2538	1881
No. K-242—Letter from Robert W. Purcell to Mr. Robert R. Young, dated January 16, 1950	2542	1887
No. K-244—Letter from Secretary to Mr. Purcell (Miss Stiver) to Mr. Robert R. Young, dated January 20, 1950	2543	1888
No. K-245—Letter from J. J. Anzalone to Alleghany Corporation, dated January 20, 1950	2544	1888
No. K-246—Letter from Allan P. Kirby to Alleghany Corporation, dated January 20, 1950	2545	1889
No. K-247—Letter from Robert R. Young to Alleghany Corporation, dated January 20, 1950	2546	1890
No. K-254—Memorandum addressed to Robert R. Young and Robert W. Purcell, dated February 22, 1950	2547	1891
No. K-276—Letter from Investors Diversified Services, Inc., E. E. Crabb to Mr. R. W. Purcell, dated January 5, 1951	2548	1892
No. K-278—Letter from R. W. Purcell to Mr. Robert R. Young, dated May 7, 1951	2551	1896
No. K-292—Letter from Graubard & Moskovitz to Hon. Robert J. Fitzsimmons, Referee, dated December 22, 1955	2553	1898

	Original	Print
Record from the United States District Court for the Southern District of New York (60 Civ. 3511)—Continued		
Defendant Kirby Exhibits—Continued		
No. K-293—Special Report on Investors Syndicate, Inc. (Subsidiary and Controlled Companies) Prepared by Saunders, Stiver & Co., dated January 10, 1949	2558	1905
No. K-294—Investors Syndicate, Inc.—What The Analysis Reveals. Report by Charles Shipman, dated April 7, 1949	2585	1933
No. K-295—Investors Diversified Services in Mid-1949—Report by Charles Shipman, dated August 15, 1949	2606	1951
No. K-306—Articles of Restatement of Charter of Alleghany Corporation	2619	1965
No. K-310—Investors Diversified Services, Inc. —Condensed Statement of Net Income for Years 1949 and 1950, by Quarters	2634	1980
No. K-311—Investors Diversified Services, Inc. —Analysis, by quarters, of the larger items included in "Commissions and participation project fees" Year Ended December 31, 1950	2636	1982
No. K-320—Memorandum—Robert W. Purcell —IDS Purchases for 1949 and 1950	2637	1983
No. K-353—*Zenn* v. *Anzalone*, Sup. Ct. N.Y. Co. Index No. 7244/1954—Testimony of Robert W. Purcell before Referee Fitzsimmons	2638	1984
No. K-354—Letter from N. B. Waag, Vice-President, Investors Diversified Services, Inc. to Mr. R. W. Purcell, dated August 2, 1955	2778	2060
No. K-355—*Zenn* v. *Anzalone*, Sup. Ct. N.Y. Co. Index No. 7244/1954—Excerpts of testimony given during the hearings before Referee Fitzsimmons by David W. Wallace, Mr. Clark, Robert R. Young, Dr. Edward Kessler, Thomas F. Daly, and Abraham Pomerantz	2779	2061

	Original	Print
Record from the United States District Court for the Southern District of New York (60 Civ. 3511)—Continued		
Defendant Kirby Exhibits—Continued		
No. K-356—Subpoena to Alleghany Corporation, dated November 3, 1955	2862	2095
No. K-357—Transcript of Hearing before Hon. Owen McGivern on December 28, 1959 in *Zenn* v. *Anzalone*	2684	2097
No. K-358—Investors Diversified Services, Inc. —56th Annual Report—1949 (excerpts)	2898	2115
No. K-359—Investors Diversified Services, Inc. —57th Annual Report 1950 (excerpts)	2916	2133
No. K-361—Investors Diversified Services, Inc. —58th Annual Report for the Year ended December 31, 1951 (excerpts)	2938	2156
No. K-362—Investors Diversified Services, Inc. —59th Annual Report for the Year ended December 31, 1952 (excerpts)	2958	2178
No. K-363—Investors Diversified Services, Inc. —Annual Report year ended December 31, 1953—60th Anniversary Year 1894–1954 (excerpts)	2983	2204
No. K-364—Investors Syndicate of America, Inc.—Annual Report to Certificate Holders for the Year Ended December 31, 1949 (excerpts)	3013	2234
No. K-365—Investors Syndicate of America, Inc.—Annual Report to Certificate Holders for the Year Ended December 31, 1950 (excerpts)	3033	2254
DEFENDANT IRELAND EXHIBIT		
No. I-42—Notice of Entry of Judgment dated June 22, 1960 with attached Judgment entered June 21, 1960 in *Zenn* v. *Anzalone*, Sup. Ct. N.Y. Co. Index No. 7244/1954	3052	2273
Affidavit of Charles T. Ireland, Jr. sworn to June 21, 1960	3061	2284

	Original	Print
Record from the United States District Court for the Southern District of New York (60 Civ. 3511)—Continued		
DEFENDANT PHILLIPS EXHIBIT		
No. R.P.-27—Handwritten memorandum dated "Nov. 18 CTI said:—	3063a	2286
Opinion, #28880, Dawson, J., dated May 28, 1963 in *Alleghany Corporation* v. *Allan P. Kirby, et al.* (60 Civ. 3511)	3064	2287
Judgment, dated June 5, 1963	3127	2328
Opinion, Moore, J., Docket No. 29,397, dated May 19, 1964	3129	2329
Concurring opinion, Kaufman, J.	3149	2347
Dissenting opinion, Friendly, J.	3152	2350
Judgment, dated May 19, 1964	3174	2370
Petition for rehearing, Docket No. 28397 filed June 23, 1964 (omitted in printing)	3175	2371
Orders granting petition for rehearing in banc	3204	2372
Order modifying order dated July 22, 1964 granting petition for rehearing in banc	3206	2374
Opinion on rehearing, Per Curiam, January 12, 1965	3207	2375
Judgment	3209	2377
Orders on motion in banc to recall mandate and grant leave to intervene to certain shareholders of Alleghany Corporation, etc.	3340	2378
Clerk's certificates (omitted in printing)	3342	2379
Opinion, Kaufman, J., Docket No. 29652, dated April 21, 1965	3342a	2380
Dissenting opinion, Hays, J.	3342h	2387
Judgment	3342j	2388
Orders extending time in which to file petition for writ of certiorari and memorandums of Mr. Justice Harlan	3342 l	2389
Orders allowing certiorari	3343	2391

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[fol. 1]

Appendix to Appellants' Brief

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 28397

ALLEGHANY CORPORATION, Plaintiff-Appellant,

—against—

ALLAN P. KIRBY, CHARLES T. IRELAND, JR. and FRED M. KIRBY, Defendants-Appellees,

RANDOLPH PHILLIPS, Defendant.

Statement Under Rule 15(b)

This action for rescission of a judicially approved settlement of prior derivative actions brought on behalf of plaintiff-appellant, or, in the alternative, for damages for fraud in the inducement thereof, was commenced by the filing of a complaint by three stockholders of plaintiff-appellant on September 8, 1960 under the caption

> "JOHN D. MURCHISON and CLINT W. MURCHISON, JR., co-partners, d/b/a Murchison Brothers, and GERARD L. FOSSLAND, as stockholders of Alleghany Corporation, on behalf of themselves and all other stockholders similarly situated, *Plaintiffs,*
>
> *against*
>
> ALLAN P. KIRBY, RANDOLPH PHILLIPS, FRED M. KIRBY, CHARLES T. IRELAND, JR., CHARLES T. HILL, ALFRED E. PERLMAN, WILLIAM G. RABE, JOSEPH M. FITZSIMMONS, ANTHONY SMITH and ALLEGHANY CORPORATION, *Defendants.*"

[fol. 2] Of the named defendants only Allan P. Kirby, Randolph Phillips, Fred M. Kirby, Charles T. Ireland, Jr., and Alleghany Corporation were served. These defendants each filed an answer on October 17, 1960.

Amended answers were filed by Fred M. Kirby on October 18, 1960, by Allan P. Kirby, Charles T. Ireland, Jr., and Alleghany Corporation on October 26, 1960 and by Randolph Phillips on November 4, 1960. Allan P. Kirby and Fred M. Kirby filed further amended answers on November 14, 1960.

A motion for summary judgment was made by defendant Randolph Phillips and denied in an opinion filed January 30, 1961 by the Honorable Edward T. Weinfeld, U. S. D. J.

The Honorable Archie O. Dawson, U. S. D. J. was assigned to this case for all purposes by order of the Honorable Sylvester J. Ryan, U. S. D. J. on February 16, 1961.

On June 23, 1961 a stipulation and order was filed substituting the firm of Watters & Donovan as attorneys for Alleghany Corporation in the place and stead of the firm of Kissam & Halpin.

An order was made and entered by Judge Dawson on June 26, 1962 substituting Alleghany Corporation as plaintiff in the place and stead of the previous stockholder plaintiffs and dropping Charles T. Hill, Alfred E. Perlman, William G. Rabe, Joseph M. Fitzsimmons and Anthony Smith as named defendants. A concurrent motion for leave to file a proposed amended and supplemental complaint was reserved for a pre-trial conference to be held on June 29, 1962.

On June 28, 1962 a stipulation and order was filed substituting the firm of Townley, Updike, Carter & Rodgers [fol. 3] as attorneys for Alleghany Corporation in the place and stead of the firm of Watters & Donovan.

On June 29, 1962 a pre-trial conference was held before Judge Dawson and plaintiff's motion for leave to file the

then proposed amended and supplemental complaint was denied without prejudice to a further motion to file an amended and supplemental complaint in a form discussed at the conference.

On December 3, 1962 plaintiff's second motion to file a revised proposed amended and supplemental complaint also was denied without prejudice.

A further revised amended and supplemental complaint was authorized by Judge Dawson on December 14, 1962.

On December 18, 1962 an amended and supplemental complaint was filed.

Answers to the amended and supplemental complaint were filed by defendant Phillips on December 28, 1962 and by defendants Charles T. Ireland, Jr., Fred M. Kirby and Allan P. Kirby on December 31, 1962.

The trial of the action took place before Judge Dawson sitting without a jury on April 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18 and 19, 1963.

Decision was rendered in an opinion dated May 28, 1963 and judgment dismissing the complaint in accordance with said decision was filed and approved on June 5, 1963.

Notice of appeal from so much of the judgment as dismissed the complaint against Allan P. Kirby, Charles T. Ireland, Jr., and Fred M. Kirby together with a cost bond on appeal was filed on July 1, 1963.

The names of the present parties are as stated in the caption herein. There have been no changes or additions of parties or attorneys other than as noted above since the inception of this action.

[fol. 3a]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 29652

ALLEGHANY CORPORATION, Plaintiff-Appellee,

—against—

ALLAN P. KIRBY, CHARLES T. IRELAND, JR., and FRED M. KIRBY, Defendants-Appellees,

RANDOLPH PHILLIPS, Defendant,

MARGARET L. HOLT and KATHLEEN L. McMAHON, Applicants-Appellants.

On Appeal From an Order Dated April 9, 1965, by the United States District Court for the Southern District of New York, Denying Applicants the Right to Intervene in Alleghany Corp. v. Kirby, et al., Docket No. 28397 to Petition for a Writ of Certiorari on Behalf of Alleghany Corporation.

APPELLANTS' APPENDICES—Filed April 15, 1965

[File endorsement omitted]

[fol. 4] APPENDIX A

The following papers are reprinted from the record before the District Court on April 9, 1965, and certified to this Court on this appeal.

[fol. 6]

Statement Under Rule 15(b).

This is an appeal from an order made and entered April 9, 1965 by the Hon. Sylvester J. Ryan, U. S. D. J. denying appellants' application pursuant to Federal Rule 24(a)(2) for permission to intervene as of right in *Alleghany Corporation* v. *Kirby, et al.* (S. D. N. Y. 60 Civ. 3511) 218 F. Supp. 164, affirmed on rehearing *en banc* 340 F. 2d 371. Appellants' application was made by order to show cause signed by Judge Ryan April 8, and returnable April 9, 1965.

Intervention was sought by Appellants, as shareholders of Alleghany Corporation, to enable them to petition the United States Supreme Court for a Writ of Certiorari to review the judgment of this Court made and entered January 12, 1965 pursuant to the 4-4 decision on the rehearing *en banc.*

All of the papers on the appeal in *Alleghany* v. *Kirby, et al.,* Dkt. No. 28397 (initial decision reported at 333 F. 2d 327) have been certified to this Court on this appeal. None are reprinted here. For the Court's convenience we reprint here the statement under Rule 15(b) on the earlier appeal since all of the prior steps in the action in which intervention is sought are set forth therein:

"Statement Under Rule 15(b)

"This action for rescission of a judicially approved settlement of prior derivative actions brought on behalf of plaintiff-appellant, or, in the alternative, for damages for fraud in the inducement thereof, was commenced by the filing of a complaint by three stockholders of plaintiff-appellant on September 8, 1960 under the caption

[fol. 7] 'JOHN D. MURCHISON and CLINT W. MURCHISON, JR., co-partners, d/b/a Murchison Brothers, and GERARD L. FOSSLAND, as stockholders of Alleghany Corporation, on behalf of themselves and all other stockholders similarly situated, *Plaintiffs,*

against

ALLAN P. KIRBY, RANDOLPH PHILLIPS, FRED M. KIRBY, CHARLES T. IRELAND, JR., CHARLES T. HILL, ALFRED E. PERLMAN, WILLIAM G. RABE, JOSEPH M. FITZSIMMONS, ANTHONY SMITH and ALLEGHANY CORPORATION, *Defendants.*'

"Of the named defendants only Allan P. Kirby, Randolph Phillips, Fred M. Kirby, Charles T. Ireland, Jr., and Alleghany Corporation were served. These defendants each filed an answer on October 17, 1960.

"Amended answers were filed by Fred M. Kirby on October 18, 1960, by Allan P. Kirby, Charles T. Ireland, Jr., and Alleghany Corporation on October 26, 1960 and by Randolph Phillips on November 4, 1960. Allan P. Kirby and Fred M. Kirby filed further amended answers on November 14, 1960.

"A motion for summary judgment was made by defendant Randolph Phillips and denied in an opinion filed January 30, 1961 by the Honorable Edward T. Weinfeld, U. S. D. J.

"The Honorable Archie O. Dawson, U. S. D. J. was assigned to this case for all purposes by order of the Honorable Sylvester J. Ryan, U. S. D. J. on February 16, 1961.

"On June 23, 1961, a stipulation and order was filed substituting the firm of Watters & Donovan as attor-
[fol. 8] neys for Alleghany Corporation in the place and stead of the firm of Kissam & Halpin.

"An order was made and entered by Judge Dawson on June 26, 1962 substituting Alleghany Corporation as plaintiff in the place and stead of the previous stock-

holder plaintiffs and dropping Charles T. Hill, Alfred E. Perlman, William G. Rabe, Joseph M. Fitzsimmons and Anthony Smith as named defendants. A concurrent motion for leave to file a proposed amended and supplemental complaint was reserved for a pre-trial conference to be held on June 29, 1962.

"On June 28, 1962, a stipulation and order was filed substituting the firm of Townley, Updike, Carter & Rodgers as attorneys for Alleghany Corporation in the place and stead of the firm of Watters & Donovan.

"On June 29, 1962 a pre-trial conference was held before Judge Dawson and plaintiff's motion for leave to file the then proposed amended and supplemental complaint was denied without prejudice to a further motion to file an amended and supplemental complaint in a form discussed at the conference.

"On December 3, 1962 plaintiff's second motion to file a revised proposed amended and supplemental complaint also was denied without prejudice.

"A further revised amended and supplemental complaint was authorized by Judge Dawson on December 14, 1962.

"On December 18, 1962 an amended and supplemental complaint was filed.

"Answers to the amended and supplemental complaint were filed by defendant Phillips on December 28, 1962 and by defendants Charles T. Ireland, Jr., [fol. 9] Fred M. Kirby and Allan P. Kirby on December 31, 1962.

"The trial of the action took place before Judge Dawson sitting without a jury on April 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18 and 19, 1963.

"Decision was rendered in an opinion dated May 28, 1963 and judgment dismissing the complaint in accordance with said decision was filed and approved on June 5, 1963.

"Notice of appeal from so much of the judgment as dismissed the complaint against Allan P. Kirby,

Charles T. Ireland, Jr., and Fred M. Kirby together with a cost bond on appeal was filed on July 1, 1963.

"The names of the present parties are as stated in the caption herein. There have been no changes or additions of parties or attorneys other than as noted above since the inception of this action."

On October 9, 1963 a stipulation and order was filed substituting the firm of Donovan, Leisure, Newton & Irvine in the place and stead of the firm of Kissam & Halpin as attorneys for Charles T. Ireland, Jr. And, on April 9, 1965 Judge Ryan approved the substitution of the firm of Willkie, Farr, Gallagher, Walton & Fitzgibbon as attorneys for Alleghany Corporation in the place and stead of Townley, Updike, Carter & Rodgers who appear in this proceeding on behalf of the applicants for intervention.

[fol. 10]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR., and FRED M. KIRBY, Defendants.

ORDER TO SHOW CAUSE

Upon the annexed affidavits of Margaret L. Holt, Kathleen L. McMahon and Stuart N. Updike, all sworn to April 7, 1965, and upon the prior proceedings had herein, it is

Ordered, that Alleghany Corporation and Defendants Allan P. Kirby, Charles T. Ireland, Jr. and Fred M. Kirby show cause before me, in Chambers, Room 2203 of the United States Court House, Foley Square, New York, at 11:30 o'clock in the forenoon of the 9th day of April, 1965, or as soon thereafter as counsel may be heard, why an order should not be made and entered herein pursuant to Federal Rule 24(a), *Pellegrino* v. *Nesbit,* 203 F. 2d 463 (9th Cir. 1953), *Park & Tilford* v. *Schulte,* 160 F. 2d 984 (2d Cir. 1947), and *Wolpe* v. *Poretsky,* 144 F. 2d 505 (D. C. Cir. 1944), permitting said Margaret L. Holt and Kathleen L. [fol. 11] McMahon, preferred shareholders of Alleghany Corporation:

(a) To intervene in the above-entitled action for the purpose of filing a petition for certiorari in the United States Supreme Court on behalf of Alleghany Corporation, themselves and all other shareholders similarly situated, and taking such other and further action thereafter as may be necessary to protect the interests of said parties; or in the alternative,

(b) Granting such other relief as this Court deems necessary and just; and it is

Further Ordered, that delivery of a copy of this order and the papers upon which it is granted to the offices of Alleghany Corporation and Donovan Leisure Newton & Irvine, attorneys for defendants, on or before 12 o'clock noon on the 8th day of April, 1965, shall be deemed due and sufficient service thereof.

Sylvester J. Ryan, U. S. D. J.

[fol. 12]

AFFIDAVIT OF STUART N. UPDIKE IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Stuart N. Updike, being duly sworn, says:

1. I am an attorney, admitted to practice in the courts of the State of New York, and in this Court, and I am a member of the firm of Townley, Updike, Carter & Rodgers.

2. This affidavit is in support of an application by Mrs. Margaret L. Holt and Miss Kathleen L. McMahon, preferred shareholders of Alleghany Corporation, to intervene in this action on behalf of Alleghany Corporation, themselves and all other shareholders similarly situated in order: (a) to apply to the United States Supreme Court for an extension of time in which to file a petition for certiorari, and (b) to file such a petition and further prosecute this litigation.

3. Plaintiff's time to petition for a writ of certiorari from the United States Supreme Court expires Monday, April 12, 1965, and any application for an extension of time must be made by an appropriate party prior to that time. Hence, it has been necessary to present this motion by Order to Show Cause. It is made to the Chief Judge of the Southern District of New York because this action was assigned to the Honorable Archie O. Dawson, now deceased, by a Rule 2(b) Order dated February 10, 1961, and presently is pending in this Court pursuant to the [fol. 13] mandate of the Court of Appeals for the Second Circuit, dated February 3, 1965. That mandate affirms the judgment of this Court dated June 5, 1963, dismissing the complaint.

4. Hitherto, my firm acted as attorneys for plaintiffs John D. Murchison, Clint W. Murchison, Jr., and Gerard L. Fossland in commencing this litigation as a stockholders'

derivative action on September 8, 1960. We became counsel to Alleghany Corporation when it was substituted as plaintiff by order of this Court (Archie O. Dawson, D.J.) on June 26, 1962. We continued to act as counsel for Alleghany during the trial of this case before Judge Dawson, during its appeal from a judgment dismissing the complaint and during a rehearing of that appeal en banc by the Second Circuit Court of Appeals. On January 12, 1965, the Court of Appeals on rehearing split 4 for affirmance to 4 for reversal (Chief Judge Lumbard not sitting). Thereafter, the Board of Directors of Alleghany instructed us to take no further steps in this matter and to submit our final statement. That bill was submitted and paid.

5. This week Mrs. Holt and Miss McMahon, as owners of Alleghany preferred stock, asked my firm to take such steps as may be proper and available to seek review by the Supreme Court of the 4 to 4 deadlock in the Court of Appeals.

6. Because an application for intervention at this late stage of proceedings is not usual in the course of derivative litigation and because my firm has most recently been retained by Alleghany itself, I believe it appropriate for me to bring to the attention of this Court the sequence of parties to this litigation as well as an outline of related facts.

[fol. 14] 7. On September 8, 1960, my firm instituted this action for John D. Murchison, Clint W. Murchison, Jr., and Gerard L. Fossland, on behalf of themselves, Alleghany and all other stockholders similarly situated. The principal defendants were Allan P. Kirby, then chief executive officer, Chairman of the Board and controlling shareholder of Alleghany, Charles T. Ireland, Jr., President of Alleghany, Randolph Phillips, a consultant to Alleghany, and Fred M. Kirby, a director of Alleghany. Remaining members of the Board of Directors were named but not served defendants. Alleghany itself was served as a defendant in the action.

8. The purpose of this action is to set aside, nullify or recover damages of approximately $60,000,000 based upon an allegedly fraudulent settlement of prior derivative actions pending in this Court and the Supreme Court, New York County.

9. On October 7, 1960, the Executive Committee of Alleghany, comprised of Allan P. Kirby, Charles T. Ireland, Jr., Fred M. Kirby, Charles T. Hill and William G. Rabe, voted to cause the Corporation to conduct an active defense of this action. Thereafter, Alleghany, as well as the principal defendants, did in fact conduct a vigorous defense.

10. At the annual Alleghany meeting held on May 1, 1961, the shareholders voted to seat an insurgent slate of directors led by John D. and Clint W. Murchison, thereby ousting the Kirby management. Thereafter, Judge Dawson repeatedly advised counsel for the parties that he considered it anomalous for John D. Murchison and Clint W. Mur- [fol. 15] chison, Jr., to be directors of Alleghany while at the same time derivative action plaintiffs. The Judge's views were communicated to the new Alleghany management.

11. On June 14, 1961, the Alleghany Board of Directors voted to rescind the Executive Committee resolution of October 7, 1960, and to cause Alleghany to adopt a position of neutrality in this litigation and to retain counsel not theretofore associated with the case to review it for the purpose of advising the new Board as to whether Alleghany should take it over.

12. On April 6, 1962, Watters & Donovan, the firm retained by the new Board to render such advice, recommended that Alleghany take over the prosecution of the action. An appropriate motion was made, and on June 26, 1962, Judge Dawson approved the substitution of Alleghany as plaintiff and the dropping of the prior shareholder

plaintiffs as well as all the nominal director defendants as parties. My firm then became counsel of record to Alleghany in this action.

13. Discovery was completed and the case tried in the spring of 1963. On May 20, Judge Dawson rendered his opinion dismissing the complaint (218 F. Supp. 164). Both my firm and the firm of Watters & Donovan recommended to the Board of Directors that an appeal be taken from part of the judgment. That advice was followed, and the case was briefed during the summer and fall of 1963.

14. Two days subsequent to oral argument of the appeal in the Court of Appeals on December 2, 1963, defendant Allan P. Kirby regained direct control of Alleghany [fol. 16] by purchasing a substantial block of stock from Bertin C. Gamble. Thus, Mr. Granville Whittlesey, a member of the firm of Donovan Leisure Newton & Irvine, counsel for Mr. Kirby in this action, stated in an affidavit dated October 29, 1963:

> "At the meeting on December 4, control of Plaintiff-Appellant Alleghany Corporation will pass from the present management directly into the hands of Defendant-Appellee Allan P. Kirby."

15. On May 20, 1964, the Court of Appeals affirmed Judge Dawson's dismissal of the complaint 2 to 1 (333 F. 2d 327). Three opinions were written, including a vigorous dissent. Among other things, the dissent took note of Mr. Kirby's resumption of direct control of the Corporation:

> "Since Kirby has regained control of Alleghany, I would instruct the judge to make provision for the continued prosecution of the action free from any control by the present directors."

16. On June 9, 1964, we recommended to the Board that the Corporation petition for rehearing en banc. The Board,

including Mr. Kirby, unanimously authorized that step. We prepared a petition, and it was granted 4 to 3 on July 22, 1964.

17. Thereafter, the case was briefed for the rehearing en banc, and on January 12, 1965, the Second Circuit Court of Appeals reported that it was deadlocked with four judges voting to affirm and four judges voting to reverse. Consequently, the judgment below was affirmed by operation of law (340 F. 2d 311).

[fol. 17] 18. I advised Mr. Ireland, who became President of Alleghany Corporation upon Mr. Kirby's resumption of control, of the opinions of the Second Circuit. Subsequently, Mr. Ireland asked my firm to recommend what steps, if any, the Corporation should take to further prosecute this litigation or protect its interest in this matter. We prepared an opinion letter to the Board recommending the filing of a petition for a writ of certiorari. On February 9, 1965, I am informed, the Board of Directors, with Messrs. Allan P. Kirby, Charles T. Ireland, Jr., and Fred M. Kirby neither present for the discussion nor voting, voted not to authorize a petition for certiorari in this litigation. Mr. Ireland confirmed this to me in writing on February 19, 1965. We were asked for our final bill, and it was paid promptly upon submission.

19. This week Mrs. Holt and Miss McMahon asked my firm to prepare the papers necessary to enable them to intervene as plaintiff shareholders for purposes of carrying this litigation to the United States Supreme Court. Neither Mrs. Holt nor Miss McMahon had any prior relation to this litigation.

20. My firm is now in the position of having prosecuted this action against Mr. Kirby (a) while Alleghany was under his control, (b) while Alleghany was under the control of a management hostile to him, and (c) while Alleghany was once again under his control. In sum, the

management of Alleghany has shifted twice, but the ultimate purpose and effect of this litigation has remained constant, namely, an effort to set aside an unlawfully procured settlement or recover damages based thereon. I believe, therefore, that in view of the even split in the Court [fol. 18] of Appeals and Mr. Kirby's return to direct control of the corporate affairs, the only feasible means of ultimately resolving the issues posed by this litigation is to approve the present application for intervention to enable an application to be presented to the United States Supreme Court for further appellate review.

Stuart N. Updike

Sworn to before me this 7th day of April, 1965.

Margaret K. Garvey, Notary Public.

[fol. 19]

AFFIDAVIT OF MARGARET L. HOLT IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Margaret L. Holt, being duly sworn, says:

1. I reside at 549 East 234th Street, Bronx, New York and I am a stockholder of Alleghany Corporation, now holding 650 shares of preferred stock of that Corporation.

2. I held those shares at the time of the transaction complained of and have held such shares continually since that time. I purchased the first of the 650 shares which I now own and have continuously held on March 4, 1955 and the last of those shares on June 11, 1958. Said stock is held in the street name of G. H. Walker & Co., 45 Wall Street, New York, New York.

3. I make this affidavit in support of the application by my sister, Kathleen L. McMahon, and myself to intervene in this action.

4. The application to intervene is brought for the purpose of obtaining this Court's permission to prosecute derivatively on behalf of Alleghany Corporation through the firm of Townley, Updike, Carter & Rodgers an appeal from the affirmance by the Court of Appeals for the Second Circuit of the dismissal of the complaint in this action, and to assert the claims therein. We have retained said firm to make this application on our behalf and as counsel in the event that the Court approves the application.

[fol. 20] 5. Miss McMahon and I make this application on our own behalf and for the benefit of Alleghany Corporation and all other stockholders of Alleghany Corporation who may be similarly situated.

6. I am informed that after the 4 to 4 decision by the Court of Appeals, which resulted in affirming the dismissal of the complaint by the District Court, the Board of Alleghany Corporation voted to abandon further prosecution of this action. I also understand that Allan P. Kirby, the principal defendant in this action, has owned over forty percent of the stock of Alleghany Corporation since early December, 1963, at which time Mr. Kirby became Board Chairman.

7. I am familiar with the claim asserted in the complaint in this action and have read the opinions of the original panel of the Court of Appeals as well as the decision of the entire bench. I am firmly convinced of the merits of Alleghany's claim, and strongly believe that an appeal to the Supreme Court should be taken.

8. Immediate action on this application has been made necessary by the fact that the time in which to file a petition to the Supreme Court or request an extension of time for filing such a petition expires on April 12, 1965. I am informed that unless a request for an extension of time is filed by then the opportunity to appeal to the Supreme Court will be forever lost to Alleghany and to its shareholders.

9. This application was not made sooner because I did not learn of the action by the Alleghany Board until April 4, 1965.

[fol. 21] Wherefore, I respectfully ask that an order be made and entered herein permitting Miss McMahon and myself to intervene in this action on behalf of ourselves and all other shareholders similarly situated, in the right of Alleghany Corporation, for the purpose of filing a petition to the Supreme Court of the United States and to further prosecute this litigation through our attorneys Townley, Updike, Carter & Rodgers.

Margaret L. Holt

Sworn to before me this 7th day of April, 1965.

Margaret K. Garvey, Notary Public.

[fol. 22]

AFFIDAVIT OF KATHLEEN L. MCMAHON IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Kathleen L. McMahon, being duly sworn, says:

1. I reside at 549 East 234th Street, Bronx, New York and I am a stockholder of Alleghany Corporation, now holding 550 shares of preferred stock of that Corporation.

2. I held those shares at the time of the transaction complained of and have held such shares continually since that time. Specifically, I purchased the first of the 550 shares which I now own and have continuously held on March 4, 1955 and the last of those shares on November 21, 1958. Said stock is held in the street name of G. H. Walker & Co., 45 Wall Street, New York, New York.

3. I make this affidavit in support of the application by my sister, Margaret L. Holt, and myself to intervene in this action on our own behalf for the benefit of Alleghany Cor-

poration and all other shareholders of that Corporation who may be similarly situated.

4. I have read the affidavit of Mrs. Holt in support of this application and like Mrs. Holt, I make this application for the purpose of obtaining this Court's permission to prosecute derivatively on behalf of Alleghany Corporation an appeal in this suit to the Supreme Court of the United States and to assert the claims contained in the complaint in this action.

[fol. 23] 5. I also understand that the Board of Alleghany Corporation has voted to abandon further prosecution of this action, and that Allan P. Kirby, the principal defendant in this case, owns over forty percent of the stock of Alleghany Corporation.

6. I too have retained Townley, Updike, Carter & Rodgers as my counsel and intend to ask that firm to continue to represent me in this action should the Court grant this application.

7. Like Mrs. Holt, I did not learn of the action of the Alleghany Board until April 4, 1965, and I wish to emphasize the need for immediate action by this Court in regard to our request for permission to intervene in light of the fact that the time in which an application to the Supreme Court must be made expires on April 12, 1965.

8. Having become familiar with the claim asserted in this action and having read the opinions of the original panel and the decision of the entire bench of the Court of Appeals, I am convinced that this case should be appealed to the Supreme Court.

Wherefore, I respectfully request that the relief asked for in the application and in Mrs. Holt's affidavit be granted.

Kathleen L. McMahon

Sworn to before me this 7th day of April, 1965.

Margaret K. Garvey, Notary Public.

[fol. 24]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF JAMES W. DEER IN OPPOSITION TO MOTION

State of New York,
County of New York, ss.:

James W. Deer, being duly sworn, deposes and says:

1. I am a member of the Bar of the State of New York and of this Court, and am a partner in the firm of Holtzmann Wise & Shepard, 30 Broad Street, New York, N. Y.

2. Since October, 1962 I have been a member of the board of directors of Alleghany Corporation. As a director I am familiar with the developments in this litigation and the action taken by the board with respect to this litigation during the period since my board service began.

3. When, in May, 1964, the United States Court of Appeals for the Second Circuit affirmed Judge Dawson's decision dismissing this action, I, acting in my capacity as a director, consulted the firm of Willkie Farr Gallagher Walton & Fitzgibbon as to my obligations as a director with respect to continuation of this litigation. The Willkie firm had previously been retained by the Murchison controlled board of Alleghany in the spring of 1963 in connection with other matters.

4. On June 9, 1964, along with all the other members of the Alleghany board, I voted to authorize the firm of Townley Updike Carter & Rodgers to seek reargument *en banc* of the decision of the Court of Appeals.

[fol. 25] 5. Following the grant of the application for reargument and the subsequent 4-4 affirmance of the original decision on January 12, 1965, I again consulted the Willkie firm as to the obligations of the directors of Alleghany with respect to this case.

6. Under date of February 8, 1965 the Willkie firm rendered an opinion (a copy of which is attached as Exhibit A) to me in my capacity as an Alleghany director advising me in substance that the independent directors of Alleghany were free to exercise their best business judgment as to whether or not they should cause Alleghany to apply for *certiorari* in this litigation. The board also consulted the Updike firm, and received their opinion dated February 1 that they should authorize an application for *certiorari*. Copies of both opinions were furnished to all the members of the board prior to their regular meeting on February 9th. The board met on February 9th and the four directors who are personally involved in this litigation absented themselves from the meeting. After a full discussion of the matter the independent directors voted unanimously (one director abstained for personal reasons) not to authorize the Updike firm to apply for *certiorari* on the ground that it would not be in the best interest of the corporation to do so. I personally informed Mr. Updike of this decision, and the reasons for it, the same day. The Willkie firm was also informed of our decision and our reasons for it the following day.

7. In reaching this conclusion the independent directors considered that they should take into account not merely the relatively modest cost of an application for *certiorari*, whatever its prospects for success, but also what was likely [fol. 26] to happen to the corporation if *certiorari* were granted and the decisions of the lower courts were thereafter reversed and the case sent back for further proceedings. Among other things, the directors considered the following:

(a) The likelihood that this litigation would continue for many years, with millions of dollars of expense to re-litigate an issue which has been vigorously litigated in one form or another since 1955 and on which the corporation has never prevailed;

(b) The likelihood that the litigation, at least insofar as the board was advised by the Updike firm, would proceed against Kirby alone, even though he was the only person involved in the 1950 exchange transaction as to whom everyone, including Judge Friendly, had agreed no case of fraud or wrong-doing had been made out;

(c) The fact that a reversal by the Supreme Court might require it to re-open the State Court judgment in *Zenn* v. *Anzalone,* and the uncertainty as to what reopening that judgment would mean to Alleghany's control of Investors Diversified Services, Inc. (IDS). This judgment, which terminated litigation against Kirby, Murchison Brothers, the Estate of Robert R. Young and Robert W. Purcell, also compelled Murchison Brothers to return control of IDS to Alleghany. The value of Alleghany's IDS investment is in excess of $115 million and this investment constitutes over half of Alleghany's total assets. Control of that investment both in the legal and economic sense is of crucial importance to Alleghany and the directors did not want to risk losing it.

[fol. 27] (d) The certainty that continued litigation would deprive Alleghany stockholders of a management able to concentrate on Alleghany affairs instead of being diverted for years by a continuation of litigation already ten years old. In this connection the directors bore in mind the fact that this same litigation had paralyzed the affairs of the corporation for at least five years from 1955 to 1960.

In short, the directors concluded that the prospects for ultimate benefit to Alleghany by pursuing this litigation were uncertain at best and the detriment to Alleghany in doing so was real and substantial. On this basis the directors exercised their business judgment and voted to discontinue the lawsuit.

8. None of the directors who voted not to authorize Mr. Updike to seek to continue the litigation is under Kirby domination or associated with him as employee, supplier, etc. They all have a large financial stake in Alleghany and exercised their judgment as to how best to protect it. They represent on Alleghany's board almost 20% of Alleghany's outstanding stock, which is owned by companies of which they are themselves directors or officers. Mr. Lincoln represents the Nationwide Insurance Companies on the Alleghany board. The Nationwide Companies own in the aggregate approximately 789,000 shares of Alleghany common stock plus 9,200 shares of preferred and 85,100 warrants. Mr. Odell represents Allied Properties, of which he is chief stockholder and which owns 450,000 shares of Alleghany common stock. Mr. Hunt represents Coral Ridge Properties, Inc., of which he is principal stockholder and which owns in excess of 100,000 shares of Alleghany common [fol. 28] stock. Each of the other directors has a substantial personal Alleghany holding. I represent Gamble-Skogmo, Inc., which owns 500,000 shares of Alleghany common stock.

9. An attempt at the eleventh hour to overturn the business judgment of the nine independent directors of Alleghany, in a matter in which their own financial stake is enormously greater than that of the applicants here, is an unwarranted intrusion on the business judgment of the board of directors of the corporation.

10. For the foregoing reasons I respectfully request that the application to intervene be denied.

James W. Deer

Sworn to before me this 8th day of April, 1965.

Rose H. Suelt, Notary Public.

[fol. 29]

EXHIBIT A TO AFFIDAVIT OF JAMES W. DEER

WILLKIE FARR GALLAGHER WALTON
& FITZGIBBON
1 CHASE MANHATTAN PLAZA
NEW YORK, N. Y. 10005

February 8, 1965

James W. Deer, Esq.
30 Broad Street
New York, N. Y. 10004

Re: *Alleghany Corporation* v. *Kirby et al.*

Dear Mr. Deer:

This is in response to your letter dated January 21, 1965 in which our advice was requested by you in your capacity as a director of Alleghany Corporation ("Alleghany") in connection with the above litigation.

QUESTION CONSIDERED

We have examined (a) the opinion dated May 28, 1963 of the United States District Court for the Southern District of New York in the above entitled action (the "District Court Decision") which held that judgment should be entered for the defendants dismissing the complaint, (b) the opinion dated May 19, 1964 of the United States Court of Appeals for the Second Circuit (the "Initial Second Circuit Decision") which affirmed the District Court Decision, Judge Friendly dissenting, and (c) the recent *per curiam* decision *en banc* of the United States Court [fol. 30] of Appeals for the Second Circuit (the "En Banc Decision") which affirmed the District Court Decision by an equally divided court, Chief Judge Lumbard not participating. Examination of the opinions alone cannot enable us to express an informed judgment on the merits of this

litigation. We believe no useful purpose would be served at this point by our conducting a thorough examination into the extensive history of these proceedings, for we understand from your letter and our subsequent conversations that your inquiry is directed toward the responsibility of Alleghany directors to Alleghany stockholders on the question whether a review of the En Banc Decision by the United States Supreme Court on writ of certiorari should be sought.

Basic Duty of Alleghany Directors

It is, of course, fundamental that the duty of the members of the Alleghany Board is to use due care and good faith in exercising their best judgment in determining whether authorization of a petition for a writ of certiorari is in the best interests of Alleghany. In exercising this judgment and in the deliberations leading to it a prime requisite is objectivity. Therefore, no Alleghany director who is interested in the ultimate outcome of the litigation should participate either in the decision or the deliberations in that connection. This would exclude those directors who are named defendants—Allan P. Kirby, Charles T. Ireland and Fred M. Kirby—and any other director whose objectivity would be impaired by reason of any close family ties or business relations with or domination by any of the named defendants.

[fol. 31] The decision should be made by a majority of a quorum of genuinely disinterested directors. These directors should consider the question as if the defendants were persons wholly unconnected with Alleghany in order to avoid the possibility of having their decision influenced by any effect it may have on the actual named defendants. Whether he can decide with the necessary degree of objectivity is a matter to be determined by each director individually.

LIKELIHOOD OF GRANT OF WRIT OF CERTIORARI

No party may obtain a review by the Supreme Court on writ of certiorari as a matter of right. Such a review is solely within the discretion of the Court, and its Rule 19 sets forth the criteria which guide, though not necessarily control, the exercise of that discretion as follows:

> "Where a court of appeals has [1] rendered a decision in conflict with the decision of another court of appeals on the same matter; or [2] has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or [3] has decided an important question of federal law which has not been, but should be, settled by this court; or [4] has decided a federal question in a way in conflict with applicable decisions of this court; or [5] has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." (numbers added)

In our opinion, criteria [1], [4] and [5] may be excluded from consideration for we have found no other court of [fol. 32] appeals or Supreme Court decision with which the En Banc Decision is in conflict, and we do not regard the En Banc Decision or the Initial Second Circuit Decision as a far departure "from the accepted and usual course of judicial proceedings" which calls for Supreme Court supervision.

An argument could be made that there is an important question of federal law which should be settled by the Supreme Court within the meaning of criterion [3] in that the alleged fraud of Messrs. Young and Purcell which Judge Friendly attributed to Mr. Allan P. Kirby constituted a fraud on the federal district court in *Breswick* v. *Briggs*. To obtain a writ on that basis, four justices of the Supreme Court (that being the number of justices who must

vote in favor of hearing a case in order for a writ of certiorari to be granted) would have to be persuaded that (a) there is merit in Judge Friendly's novel conspiracy-attribution legal theory, *and* (b) the matter is of sufficient importance to be heard. We are doubtful on both counts. Furthermore, although the point was raised several times in the Alleghany briefs, none of the three opinions in the Initial Second Circuit Decision refers to any fraud on the *Breswick* district court.

It could also be argued that the case falls within criterion [2] on the theory that an important state question had been decided in conflict with applicable state law. This argument would center around whether the evidence allegedly not disclosed by Messrs. Young and Purcell would "*probably*" produce a different lower court result if it had been disclosed. This is the standard used by Judge Moore in the Initial Second Circuit Decision. There is some authority in New York State law (one Appellate Division, 3rd Department, case, and one Surrogate's Court case, but no New [fol. 33] York Court of Appeals case) which could be construed to mean that the proper test is whether the undisclosed documents "*might*" have produced a different result. It could thus be argued that Judge Moore incorrectly interpreted New York law by applying the "probable" rather than the "might" standard. We do not consider this argument likely to obtain the grant of a writ of certiorari for three reasons. First, there is no certain conflict between Judge Moore's opinion and New York law, for it cannot be said with assurance that the "might" theory is settled New York law. Second, assuming arguendo that there is a conflict, we are not convinced that the question is of sufficient importance to induce the Supreme Court to undertake a review. And, third, even Judge Friendly in an opinion which seemed to bring to bear every weapon in his legal arsenal did not dwell on the issue whether Judge Moore's opinion was in conflict with state law.

In view of the foregoing and after considering a statistical analysis of the numbers and categories of cases in which petitions for certiorari have been granted, we are of the opinion that the likelihood of the Supreme Court granting a writ in this case is remote. We consider the case to involve primarily an evidentiary question of a nature in which the Supreme Court rarely grants certiorari. However, the granting of certiorari being a matter of discretion of the Supreme Court, the possibility of a grant in this case cannot be ruled out. A fair appraisal must also recognize that the four to four division of the En Banc Decision is likely to attract more than ordinary interest among the Supreme Court Justices.

[fol. 34]

FACTORS TO BE WEIGHED IN DECIDING WHETHER TO PETITION

If a writ of certiorari were granted and if Alleghany were successful in each of the ensuing stages of litigation, there would be a potential recovery which has been estimated to amount to as much as $60 million. Since the amount spent in petitioning for a writ would be modest when compared with the expenses incurred by Alleghany thus far in the litigation and minute in comparison with the estimated maximum potential recovery, this additional step has a definite appeal. A "running out of the string" approach is also attractive, for if certiorari were denied the Board could nevertheless feel confident that it had exhausted every possible prosecutory effort.

However, the granting of certiorari and a reversal of the courts below by the Supreme Court would not end this litigation nor assure Alleghany of a worthwhile recovery. It could be the beginning of another long and expensive course of litigation which, in the absence of a settlement, would not end until either one of the multiple stages hereafter referred to was unsuccessful or there was an ultimate determination, sustained by further appeals, in favor of Alleghany. Assuming uniform success, this could involve

a district court trial where Alleghany would seek to have the settlement in *Zenn* v. *Anzalone* declared a nullity or to enjoin Mr. Kirby from pleading that settlement as res adjudicata, appeals from the district court decision, a trial on the fairness of the 1950 exchange transaction in which Alleghany would hope for not only a favorable legal determination but also a favorable valuation in the complex realm of damages, and appeals from that trial court decision. The [fol. 35] granting of certiorari and a reversal of the lower courts by the Supreme Court could also involve litigation against the Young Estate and Mr. Purcell which the Alleghany Board would be obliged to consider if the Supreme Court adopted Judge Friendly's theories, for he considered Messrs. Young and Purcell active participants in the alleged fraud as contrasted with his acknowledgment that personal dereliction on the part of Mr. Kirby was not established. In the absence of a settlement all of this would have to occur—and occur successfully—before Alleghany could realize recoveries beyond that already recovered in the settlements in *Zenn* v. *Anzalone*.

We emphasized at the outset of this opinion that we were not in a position to render an informed judgment on the merits of this litigation. We can observe, however, that no one can forecast with assurance that Alleghany will ultimately prevail in all the stages referred to in the preceding paragraph or, indeed, in any one of them, nor can one forecast with accuracy what the amount of the ultimate recovery for Alleghany would be assuming consistent success.

Possible Liability of Alleghany Directors if Petition Not Authorized

In our opinion the disinterested directors may properly consider the foregoing matters in arriving at their decision whether to authorize a petition for writ of certiorari. It is proper for them to consider the probabilities of a

grant of certiorari and to weigh the potential of an ultimate multimillion dollar recovery against the prospects of continued (and possibly long and expensive) litigation [fol. 36] in which there can be no assurance of success. A further factor which may be appropriately considered is that notwithstanding skillful and vigorous prosecution for over four years, no success has yet been achieved. On the other hand, one cannot summarily reject a forecast of ultimate recovery in view of the equal division of the En Banc Decision.

In our opinion, if the best judgment of the disinterested members of the Board exercised with due care and in good faith results in a decision to authorize a petition for a writ of certiorari, no liability could be asserted successfully against the participating directors. It is also our opinion that if similarly exercised best judgment reaches the conclusion that all reasonable efforts to prosecute the litigation have been made and that further expenditures of money and executive and board time are not justified when balanced against the prospects of eventual success, a decision not to authorize a petition would not subject the participating directors to personal liability.

Very truly yours,

WILLKIE FARR GALLAGHER WALTON & FITZGIBBON

Willkie Farr Gallagher Walton & FitzGibbon

[fol. 37]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

TRANSCRIPT OF REMARKS OF HON. SYLVESTER J. RYAN ON HEARING, APRIL 9, 1965

* * *

The Court: Perhaps the answer might be found in the opinion, a paragraph of Judge Dawson's opinion deciding this case, in which he referred to this suit as "but another

skirmish in the battle of tycoons, Murchison Brothers of Texas on one side and Allan P. Kirby of New Jersey on the other, for control of a rich plum, Alleghany Corporation."

And perhaps they thought that, while they might be prompted in a motive for fighting Murchison Brothers, they have no reason to engage in a skirmish with themselves.

Mr. Carter: Here is what I—

The Court: You like to think out loud, and so do I. Let me do a little thinking out loud, and it may help.

Mr. Carter: Certainly.

The Court: As I read through these opinions, I was first struck by the opening paragraph of Judge Moore on the appeal reported at 333 Fed. 2d 327. Judge Moore starts in, "For some ten years the subject matter of this lawsuit or the lawsuit now on appeal has been before the New York State and Federal Courts."

Now then, following that, I read—I started in perhaps in the inverse order; I should have read the learned opinion of my beloved brother, Judge Dawson, first, but then I read Judge Dawson's opinion, and I was struck with this situation. Here is a corporation where the funds are publicly [fol. 38] invested funds that come from the people at large, and the board of directors, irrespective of their personal ownership, they control far less than the majority of the issued stock and they are trustees for public funds.

Now, where you have a corporation such as this, Alleghany, with its checkered background through the years, in the days of the Depression, and it has been involved in litigation for ten or twelve years, I wonder whether it isn't about time that this litigation should be terminated in the interests of the investors, the public who put their money in these companies, rather than have it go on forever.

I don't know whether this Alleghany Corporation needs any financing or not, or whether it has enough monies to

operate without additional stock issues or bond issues or what ventures they may be involved in, but you can't close your eyes to facts of common knowledge.

I recall at one time this corporation or somebody affiliated with it bought a substantial share of the stock of the New York Central Railroad. It is common knowledge that negotiations or proceedings are pending looking towards a consolidation of that road with Pennsylvania Railroad, possibly of the combined corporation taking over the freight aspect of the whole New Haven Railroad, and all of these things lead one to believe that as soon as this battle between the so-called tycoons over who should have control of somebody else's money, particularly funds of the public, terminates, the better off it will be for the public. And that is my first impression of this business.

Now then, as I read the cases and I read the decisions, it appears that this suit was originally filed as a derivative stockholders diversity suit, and that it brought into ques- [fol. 39] tion a settlement which had been passed on by the New York State Supreme Court over here in New York County. And it was alleged as a basis of the relief sought here in this particular suit now before us that fraud had been perpetrated by Kirby and his associates in the accomplishment and the securing the approval of that settlement by the State Supreme Court. Those issues have been adversely determined.

Now, thinking over this problem further, I know—I feel quite sure and if I am in error, you can correct me—that while this settlement over in the State Supreme Court was pending, notice went out to all the stockholders of the contemplated settlement. That is the statutory procedure both in the State Court in a suit of this nature, and frequently in this court. These settlements cannot be accomplished without appropriate notice, due notice.

So that your petitioners must have known of the existence of this suit over in the State Court and must have had notice of its pendency and of the proposed settlement.

Now, the record shows, as I see it, that some stockholders did appear and did object to the settlement over in the State Supreme Court, but among those objecting stockholders were apparently not your clients. So they were content to leave matters go along without intervention, and they didn't intervene.

Now then, when this suit was filed, I assume that enterprising entrepreneurs, such as you represented then, Murchison Brothers, must have in their reports to the stockholders while they were in control of this company, advised the stockholders of the pendency of this suit in this court, which would bring into question the settlement which had [fol. 40] been reached and which seems to have been approved in the State Court.

Am I correct in that?

Mr. Carter: I think so, generally speaking.

The Court: So your clients knew of this suit pending here and took no steps to intervene.

I don't know whether Murchisons later on, after Judge Dawson's decision, made a report to the stockholders advising them of the result and of the intended appeal, but I assume that again they did so advise, particularly since at that time there were conferences going on between the rival forces for control.

Am I correct in assuming that these stockholders, your petitioners, were advised of Judge Dawson's decision and of the appeal?

Mr. Carter: I would assume all stockholders were.

The Court: It would be fair to assume that.

Now then, going over the record here, can I say now on the eve of the expiration of the time to file a petition for writ of certiorari, that an application by your petitioner is timely made, particularly in view of the fact that you asked to intervene for the purpose of applying for an extension of time within which to file a petition for a writ of certiorari?

There is no undertaking here that they want to file or will file, and there I am confronted with the State decision, the State statutory provision about this being a derivative stockholders suit. A bond might be required; I don't know.

Mr. Carter: No, no final judgment.

The Court: Well, I don't know. I haven't examined that, but what this would mean, if your petitioners had the relief [fol. 41] they seek granted to them, is that it would have this practical effect. It would mean that the time to appeal, to file an application for a writ, would be further extended. This writ would most likely not come up before the Court, the Supreme Court, before October, and it would mean that the affairs of this corporation, which have been the subject of litigation now for more than twelve years, would be continued and they would have that uncertainty of management and uncertainty of the future going on for six months more.

Can I say that this application is timely? Now, I have grave doubts about it.

In fact, I have tried to keep my mind open on the subject, and I am thinking out loud so that you might address your future remarks to these questions that come to my own mind.

Now then, coming down to the second obligation that you have to show of your burden that you have to establish —that is on the adequacy of the representation—I can't find any case that holds that, as a matter of law, there must be representation after an affirmance on an appeal. I have looked at the various cases you cite in your order to show cause, and I and my able staff, very competent staff, if I may say so—

Mr. Carter: We agree.

The Court: —have been unable to find any holding on that, that says that adequate representation includes the right to appeal further by attempting to secure a writ of certiorari in the Supreme Court after an affirmance by the Court of Appeals.

[fol. 42] I can't find any case on that, and I would be included to feel, as a matter of law, that had this application been timely made after Judge Dawson's opinion, you might well be entitled to intervene for the purpose of appeal. But now, on a possible action of the Supreme Court, I don't feel that, as a matter of law, you have a right to intervene now on the claim that you are not adequately represented.

Also on that, as you recite—you have been very fair in your affidavits, I must say that, as you always are—you say that Kirby and his associates have absented themselves from this vote when they voted not to file a writ of certiorari, and it also appears from that same affidavit that after Kirby and his associates came back into control of Alleghany, they did authorize an application for argument en banc. That seems to me to be a very fair indication of adequate representation, and while you, as a zealous advocate, might not feel that a decision of the board of directors of Alleghany now made not to proceed further by filing a petition for a writ is wise, you cannot supplant your decision on business as well as legal matters for their own judgment and the advice they get from their own independent counsel.

The counsel that advised them on this is not the counsel of record, not Donovan, Leisure, who might also be influenced by the zealousness of their advocacy, but it is like bringing in an independent auditor, and Willkie, Farr and Mr. Hughes, a distinguished member of our bar, gave his independent judgment, and I can't say that that is not adequate representation as a matter of law.

These are problems I have, and if you would address yourself to those two problems, I would be very grateful to everybody here. Because of the urgency of this matter, [fol. 43] I do not intend to write any opinion, and I have in mind that if any further action is taken with reference to my decision, that my observations and remarks made

here at this hearing on the minutes will constitute such opinion as the Court might desire on any review.

* * * * * * *

The Court: I think you can go right upstairs to the Court of Appeals now and ask them for any relief you want.

The matter was presented to me yesterday morning. With the consent of all parties I gave counsel an adjournment on the hearing, or they consented that it be put on today. I was willing to hear the matter yesterday. I have heard it now. I am ready to decide it now and will file my opinion, and you can take it right up to the Court of Appeals now.

I would feel much happier if you did that.

I will endorse the papers in this manner:

> "Because of the urgency of the situation presented by this application, I have written no opinion."

To sit down and write an opinion, it is going to have to be about ten pages, even five pages boiling it down, and it would have to be typewritten, and you wouldn't get it filed until tomorrow or maybe Monday.

I am giving you a decision now. I am endorsing the papers:

* * * * * * *

Now that gives you an opportunity to go right upstairs. Maybe counsel will accommodate you and accompany you. If you are going upstairs, I will have the clerk take these papers right upstairs with you.

[fol. 44]

ORDER DENYING INTERVENTION DATED APRIL 9, 1965

Because of the urgency of the situation presented by this application, I have written no opinion. See reporter's minutes of hearing held. I find and conclude that the within application is not timely made and that the applicants have had and do have adequate representation. This application is denied. So ordered.

• • • • • • •

[fol. 45]

APPENDIX B

For the convenience of the Court, the following papers are reprinted from the record before this Court *en banc* on April 12, 1965 on motions to recall the mandate in *Alleghany Corp.* v. *Kirby, et al.*, Dkt. No. 28397, to grant intervention, or to grant alternative relief.

[fol. 46]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 154

September Term 1964

Docket No. 28397

ALLEGHANY CORPORATION, Plaintiff-Appellant,

v.

ALLAN P. KIRBY, CHARLES T. IRELAND, JR. and FRED M. KIRBY, Defendants-Appellees,

RANDOLPH PHILLIPS, Defendant.

AFFIDAVIT OF STUART N. UPDIKE

State of New York,
County of New York, ss.:

Stuart N. Updike, being duly sworn, says:

1. I am an attorney, admitted to practice in the courts of the State of New York, and in this Court, and I am a member of the firm of Townley, Updike, Carter & Rodgers.

2. This affidavit is in support of an application by Margaret L. Holt and Kathleen L. McMahon, preferred shareholders of Alleghany Corporation, for an order recalling the mandate of this Court dated February 3, 1965 and permitting them to intervene in this action in the right of Alleghany Corporation and on behalf of themselves and all other shareholders similarly situated.

[fol. 47] 3. The purpose of such intervention would be to present a Petition for a Writ of Certiorari to the United States Supreme Court. The corporation's time in which to present such a petition or seek an extension of time to do so expires April 12, 1965.

4. As alternative relief, applicants seek an order permitting them to intervene for the limited purpose of applying to the Supreme Court for an extension of time in which to file a Petition for a Writ of Certiorari. Such limited intervention would be for the purpose of preserving the corporate right from extinction while this Court resolves the question of intervention for all purposes.

5. This application is made necessary (a) by the principal defendant's resumption of direct control of Alleghany subsequent to the original appeal and (b) by Alleghany's determination on February 9, 1965 not to petition for a Writ of Certiorari. Alleghany failed to communicate the fact of that decision to its shareholders by letter or in any other fashion, nor did it make any public announcement of its determination.

6. A previous application for the relief sought here was made to the Hon. Sylvester J. Ryan, U. S. D. J. on Friday,

April 9, 1965. The facts and status of that application and this one are as follows:

(a) On April 4, 1965, two shareholders, Margaret L. Holt and Kathleen L. McMahon, first learned of Alleghany's decision not to seek further appellate review and determined to apply for permission to intervene for that purpose.
[fol. 48] On April 8, 1965 they obtained an Order requiring the Corporation and defendants to show cause before the United States District Court for the Southern District of New York why intervention should not be permitted as of right so that they, as shareholders of Alleghany, might petition for a Writ of Certiorari.

(b) On April 9, 1965 the Honorable Sylvester J. Ryan, U. S. D. J., denied, on a hearing in chambers, the motion for intervention as of right upon the grounds that it was not timely and that the Corporation was adequately represented. Counsel representing the defendants, as well as counsel representing the Corporation, had opposed the motion.

(c) Immediately upon Judge Ryan's decision the papers which had been before Judge Ryan, together with a notice of appeal, were presented to the Deputy Clerk of this Court. We requested that these papers be taken before a Circuit Judge or, if possible, a panel of this Court so that a prompt hearing might be had and the order of Judge Ryan either reversed or modified to the extent that an application might be made to the United States Supreme Court to extend the time to petition for a Writ of Certiorari while the issues as to intervention for all purposes were resolved by this Court. Counsel for all parties waited in the Clerk's office for further instructions from the Clerk or the Court.

(d) The Clerk advised counsel that it would be impossible to have the matter heard that Friday after-

noon and suggested that the proper procedure would be to apply to this Court on Monday, April 12, 1965, [fol. 49] *en banc,* for an order recalling its mandate and permitting the requested intervention.

7. As a consequence of the foregoing events, we have prepared the present application. We have also filed a notice of appeal from Judge Ryan's ruling and ask as alternative relief on this motion that these papers be treated as an appeal from that ruling. In order to facilitate such treatment as well as to form the factual basis for the present motion, I annex hereto as exhibits, and make a part hereof, the papers that were before Judge Ryan as follows:

Exhibit A

Order to Show Cause dated April 8, 1965 and annexed Affidavits of Stuart N. Updike, Margaret L. Holt and Kathleen L. McMahon, all sworn to April 7, 1965.

Exhibit B

Letter of Authorization to Willkie Farr Gallagher Walton & FitzGibbon to act as attorneys for Alleghany Corporation.

Exhibit C

Affidavit of James Deer, Esq. in opposition, sworn to April 8, 1965, together with exhibit.

Exhibit D

Transcript of Argument before Judge Ryan on April 9, 1965.

8. Since the Corporation's rights will be extinguished when the time to petition for a Writ of Certiorari expires [fol. 50] April 12, 1965, my firm has filed, on behalf of the moving parties and all others similarly situated, an application for a 60-day enlargement of that time. A copy of said application is annexed hereto as Exhibit E.

9. I believe the critical facts as to the basis for shareholder intervention are set forth in my previous affidavit and those of the movant shareholders (Exhibit A hereto). In sum, these present the claim that the shareholders have an absolute right to intervene to prosecute a further appeal from the 4-4 deadlock on rehearing in this Court. This is particularly true where, as here, four Judges of this Court believe the Corporation has a meritorious claim for relief of immense magnitude.

10. The need for intervention, of course, is underscored by Mr. Kirby's return to direct control of the Corporation and the fact that there was no publicity of the corporate decision not to apply for further review.

11. Certainly, in these circumstances there can be no question of adequacy of representation of the shareholders' interests in this litigation. There is no longer any representation in the case. Nor is there any question of untimeliness. Heretofore, the shareholders' interests have been protected. Now that they are not, I respectfully suggest that the requested intervention be permitted.

(Sworn to by Stuart N. Updike on April 10, 1965.)

[fol. 51]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 28397

ALLEGHANY CORPORATION, Plaintiff-Appellant,

v.

ALLAN P. KIRBY, CHARLES T. IRELAND, JR. and FRED M. KIRBY, Defendants-Appellees,

RANDOLPH PHILLIPS, Defendant,

MARGARET HOLT and KATHLEEN McMAHON, Applicants.

State of New York,
County of New York, ss.:

Mark F. Hughes, being duly sworn, deposes and says:

1. I am a member of the firm of Willkie Farr Gallagher Walton & FitzGibbon, and am duly admitted to practice in the Courts of the State of New York and in this Court. I make this affidavit in opposition to the applicants' motion in this Court to recall its mandate and for other relief. I do so only in the event that the Court should consider the motion to recall the mandate rather than the merits [fol. 52] of the appeal from the order of the District Court denying the applicants leave to intervene in the action there.

2. Neither I nor our firm has ever represented any of the defendants in this action.

3. The only contacts that our firm have had with Alleghany Corporation are as follows:

(A) In the spring of 1963, while Alleghany was controlled by Murchison Brothers, my firm was retained by

Alleghany in connection with certain matters relating to Investors Diversified Services, Inc. (IDS), as to which the Murchisons were advocating a course of action opposed by Allan P. Kirby, a defendant herein.

(B) In May 1964 after this Court had originally affirmed the decision of the late Judge Dawson in dismissing this action my firm was contacted by James W. Deer, a member of the bar of the State of New York and of this Court, a partner in the firm of Holtzmann, Wise & Shepard of this city and a member of the Board of Directors of Alleghany Corporation. In contacting us he was acting on behalf of a group of directors which embraced all of the Board except the defendants who were directors. This group of directors sought our advice as to what position they should take with reference to the then proposed petition for rehearing with respect to continuation of this litigation.

(C) After the *en banc* reaffirmation of this Court's judgment Mr. Deer, again acting for the same group of directors, sought our opinion as to the obligations of the directors of Alleghany with respect to the prosecution of [fol. 53] this action. Under date of February 8, 1965, we rendered our opinion to Mr. Deer in his capacity as an Alleghany director advising in substance that the independent directors of Alleghany were free to exercise their best business judgment as to whether or not they should cause Alleghany to apply for certiorari in this litigation. Annexed hereto marked Exhibit A is a copy of our opinion.

(D) When these applicants made their motion for leave to intervene before Judge Ryan, Mr. Deer, after canvassing all of the directors in his group, asked us to represent Alleghany Corporation in opposition to the application, and we are doing so.

(E) We represent Alleghany Corporation in certain actions for the recovery of "short swing" profits under Section 16(b) of the Securities and Exchange Act. We were

retained in these actions at the time when the Murchison group had stock control of the Corporation.

(F) We have been and are representing the Corporation in the Supreme Court of New York County in a proceeding involving allowances to attorneys in the litigation commonly known as *Zenn* v. *Anzalone*.

4. The Alleghany board met, as I am informed, on February 9, 1965, and the independent directors, acting alone, voted unanimously not to authorize a petition for a writ of certiorari. Annexed hereto marked Exhibit B is Mr. Deer's affidavit, dated April 8, 1965, which sets forth the business considerations which led the independent directors to this result.

5. My firm was informed by Alleghany of this decision of its board the following day, February 10, 1965.

[fol. 54] 6. As appears from the proxy material of Alleghany dated April 9, 1965 (hereto annexed marked Exhibit C, pp. 2-4), the independent directors own or represent on Alleghany's board persons owning more than 1,800,000 shares of Alleghany stock, almost one-third of the outstanding stock owned by the public. It can be assumed that these directors, representing such a large percentage of Alleghany's stockholders, including several publicly-held corporations, would have voted to apply for certiorari if they thought such action sound from a business standpoint. They did not think such action would be sound, and they had the right under the law to make that determination.

7. For the foregoing reasons, I respectfully submit that the instant applications should be denied in all respects.

(Sworn to by Mark F. Hughes on April 11, 1965.)

[fol. 55]

EXHIBIT C TO AFFIDAVIT OF MARK F. HUGHES

(See opposite) ☞

ALLEGHANY CORPORATION

350 PARK AVENUE

NEW YORK, NEW YORK

NOTICE OF ANNUAL MEETING OF SHAREOWNERS

May 3, 1965 at 1:00 p.m.

SHERATON-RITZ HOTEL — MINNEAPOLIS, MINNESOTA

Notice is hereby given that the Annual Meeting of Shareowners of ALLEGHANY CORPORATION will be held at the Sheraton-Ritz Hotel, 315 Nicollet Avenue, Minneapolis, Minnesota, on May 3, 1965 at 1:00 p.m., Central Standard Time, for the following purposes:

1. To elect a Board of 13 Directors to serve until the 1966 Annual Meeting of Shareowners and until their successors shall have been elected and shall have qualified.
2. To consider and take action upon a proposal to ratify the selection of Peat, Marwick, Mitchell & Co., independent certified public accountants, as auditors for the Corporation for the year 1965.
3. To act upon a resolution proposed by four shareowners which requests that any extension of the Stock Option Incentive Plan, or any new stock option plan, be made subject to certain restrictions.
4. To transact such other business as may properly come before the meeting, or any adjournment or adjournments thereof.

The holders of 6% Convertible Preferred stock will be entitled to vote, as a separate class, for the election of two directors, and the holders of Common stock will be entitled to vote, as a separate class, for the election of eleven directors and on each of the other matters set forth above.

The stock transfer books of the Corporation will not be closed. In lieu thereof and as provided by the By-Laws, the Board of Directors has fixed the close of business on April 2, 1965, as the record date for the determination of shareowners entitled to notice of, and to vote at, the Annual Meeting, and only shareowners of record at such time will be entitled to vote at the Annual Meeting or any adjournment or adjournments thereof.

You are cordially invited to be present at the meeting. Shareowners who do not expect to attend in person are requested to sign and return the enclosed form of proxy in the envelope provided. The proxy will not be used if you subsequently decide to attend the meeting in person and so request.

By order of the Board of Directors,

JARED C. HORTON
Secretary

April 9, 1965

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[fol. 55]
EXHIBIT C TO AFFIDAVIT OF MARK F. HUGHES

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ALLEGHANY CORPORATION

PROXY STATEMENT

Annual Meeting of Shareowners to be held May 3, 1965

This statement is furnished in connection with the solicitation of proxies by your management from holders of the outstanding shares of 6% Convertible Preferred and Common stocks of Alleghany Corporation, being all of the classes of stock of the Corporation entitled to vote at the Annual Meeting of Shareowners of the Corporation (and at any and all adjournments thereof) for the purposes referred to below and set forth in the accompanying Notice of Annual Meeting of Shareowners.

The Board of Directors has fixed the close of business on April 2, 1965, as the record date for the determination of shareowners entitled to notice of, and to vote at, said meeting. As of April 2, 1965, there were outstanding and entitled to vote 10,078,885 shares of Common stock and 484,789 shares of 6% Convertible Preferred stock (herein sometimes called "Preferred stock"). Holders of the Common stock and holders of the Preferred stock are each entitled to one vote for each share held of record on the record date with respect to matters on which holders of each such class are entitled to vote.

On March 1, 1965, Allan P. Kirby, Chairman of the Board of Directors of the Corporation, was the beneficial owner of 4,084,813 shares, or 40.53% of the Common stock of the Corporation, of which 1,500,000 shares were owned of record by Mr. Kirby and 2,584,813 shares were owned of record by Sigler & Co., a nominee of Manufacturers Hanover Trust Company. As of March 8, 1965, Sigler & Co. owned of record an additional 275,784 shares of Common stock. G. H. Walker & Co., members of the New York Stock Exchange were, on March 1, 1965, the record holder of 86,582 shares or 17.85% of the outstanding Preferred stock. The Corporation has no knowledge as to the beneficial ownership of said shares, nor as to whether any single beneficial owner thereof owns in excess of 10% of the outstanding Preferred stock.

[fol. 56]

1. Election of Directors

Eleven directors are to be elected by the holders of the Common stock and two directors are to be elected by the holders of the Preferred stock, in each case to serve until the 1966 Annual Meeting of Shareowners and until their successors shall have been elected and shall have qualified.

It is intended that proxies in the enclosed form received from holders of Common stock will be voted for the election of the following as directors of the Corporation:

Walter H. Davies, Jr.; James W. Deer; Charles T. Hill; James S. Hunt; Charles T. Ireland, Jr.; Allan P. Kirby; Allan P. Kirby, Jr.; Fred M. Kirby; Robert S. Odell; William G. Rabe; Daniel E. Taylor.

It is intended that proxies in the enclosed form received from holders of Preferred stock will be voted for the election of the following as directors of the Corporation:

Murray D. Lincoln; Andrew Van Pelt.

All of the foregoing nominees are presently directors of the Corporation and were elected by the shareowners at the Annual Meeting on May 4, 1964.

If any nominee becomes unavailable for any reason or if a vacancy should occur before the election (which events are not anticipated), the shares represented by the enclosed proxy may be voted for such other person or persons as may be determined by the holders of such proxies.

The following information is submitted concerning the nominees named for election as directors. The information as to their respective principal occupations and their beneficial ownership of securities of Alleghany Corporation, The New York Central Railroad Company and subsidiaries and Investors Diversified Services, Inc. is based upon information received from the nominees themselves. All references in the following table and the notes thereto with respect to securities of Investors Diversified Services, Inc. reflect a 20-for-1 split of Class B Common stock, previously Common (voting) stock, and a 5-for-1 split of Class A Common stock, previously Class A (non-voting) stock, on May 6, 1964:

Name	Principal Occupation	Previous Service as a Director	Beneficial Stock Ownership as of March 1, 1965
Walter H. Davies, Jr.	Vice President and Treasurer, Gamble-Skogmo, Inc., Minneapolis, Minn. (merchandising).	Since December 1963	100 shares, Alleghany Common stock. (1)
James W. Deer	Lawyer, partner of the law firm of Holtzmann, Wise & Shepard, New York, N.Y.	Since October 1962	100 shares, Alleghany Common stock. (1)
Charles T. Hill	Investment banker, with W. H. Newbold's Son & Co. Philadelphia, Pa. (investment bankers)	1958 to 1961; December 1963 to present	800 shares, Alleghany Common stock.
James S. Hunt	Chairman of the Board and President, Coral Ridge Properties, Inc., Fort Lauderdale, Fla. (real estate).	Since December 1963	1,000 shares, Alleghany Common stock; 250 shares, Class A Common stock, Investors Diversified Services, Inc.; 100 shares of capital stock, The New York Central Railroad Company. (2)
Charles T. Ireland, Jr.	President, Alleghany Corporation; Chairman of Executive Committee, Investors Diversified Services, Inc.	1959 to 1961; December 1963 to present	1,000 shares, Alleghany Common stock; 100 shares, Class B Common stock, Investors Diversified Services, Inc.; 100 shares of capital stock, The New York Central Railroad Company.

[fol. 57]

Note (1): Mr. Walter H. Davies, Jr. owns 50 shares of Class B Common stock of Investors Diversified Services, Inc. as custodian for his minor son, Leslie C. Davis. Gamble-Skogmo, Inc. owned, as of March 1, 1965, 500,000 shares of the Common stock of Alleghany Corporation. Mr. James W. Deer is a member of the law firm of Holtzmann, Wise & Shepard, which represents Gamble-Skogmo, Inc. in various matters. Gamble-Skogmo, Inc. ("Gamble") has advised the Corporation that pursuant to an agreement with Murchison Brothers, dated October 4, 1962, Gamble has a "call" option, exercisable until September 20, 1965, to purchase from Murchison Brothers a maximum of 800,000 shares of Class B Common stock and 50,000 shares of Class A Common stock of Investors Diversified Services, Inc. ("IDS"), and Murchison Brothers has a "put" option, exercisable from September 20, 1965, to and including October 5, 1965, to sell such stock to Gamble. The "call" is presently exercisable at $12.50 per share of Class B Common stock and $50 per share of Class A Common stock and the "put" is exercisable at $10 per share of Class B Common stock and $40 per share of Class A Common stock. In addition, the agreement of October 4, 1962 provides that until October 5, 1965 Gamble has certain rights of first refusal to purchase an additional 413,520 shares of Class A Common stock of IDS owned by Murchison Brothers. Neither Gamble nor Murchison Brothers has expressed any intention at this time with respect to exercise of the options for stock of IDS. Gamble has advised that as of March 1, 1965 it owned no shares of stock of IDS.

Note (2): Coral Ridge Properties, Inc. and a subsidiary owned, as of March 18, 1965, 103,800 shares of the Common stock and 3,000 shares of Preferred stock of Alleghany Corporation and 8,000 shares of Class B Common stock of Investors Diversified Services, Inc. Mr. Hunt and his immediate family own 52.3% of the Class A Common stock and 55% of the Class B Common stock of Coral Ridge Properties, Inc.

Name	Principal Occupation	Previous Service as a Director	Beneficial Stock Ownership as of March 1, 1965
Allan P. Kirby	Management of personal affairs; Chairman of the Board, Alleghany Corporation; Chairman of the Executive Committee, The New York Central Railroad Company.	1937 to 1961; December 1963 to present	4,084,813 shares, Alleghany Common stock; 346,150 shares of Class A Common stock and 34,000 shares of Class B Common stock, Investors Diversified Services, Inc.; 300,100 shares of capital stock, The New York Central Railroad Company. (3) (4)
Allan P. Kirby, Jr.	President, Liberty Square, Inc. (real estate).	Since December 1963	10,900 shares, Alleghany Common stock; 2,000 shares, Class B Common stock, Investors Diversified Services, Inc. (4)
Fred M. Kirby	Executive Vice-President, Alleghany Corporation; Chairman of the Board, Investors Diversified Services, Inc.	1958 to 1961; December 1963 to present	54,120 shares, Alleghany Common stock; 13,080 shares, Class B Common stock, Investors Diversified Services, Inc. (4)
Murray D. Lincoln	Retired; Director of Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company and Nationwide General Insurance Company; formerly President of these companies and Nationwide Corporation until April, 1964.	Since December 1963	1,000 shares, Alleghany Common stock; 100 shares of capital stock, The New York Central Railroad Company. (3)
Robert S. Odell	President, Allied Properties, San Francisco, California (investments and real estate).	Since December 1963	None (5)

Note (3): Mr. Allan P. Kirby is a party to an agreement with Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company and Nationwide Life Insurance Company which, as of March 1, 1965, owned in the aggregate 789,400 shares of Alleghany Common stock, 9,200 shares of Alleghany 6% Convertible Preferred stock and 85,100 warrants for Alleghany Common stock, which provides *inter alia*, that for a period of five years from December 14, 1962 he and they will vote their respective holdings in Alleghany for a slate of directors to include persons nominated by Nationwide and persons nominated by him.

Note (4): Mrs. Marian S. Kirby, the wife of Mr. Allan P. Kirby, owned, as of March 1, 1965, 4,700 shares of Alleghany Common stock. Of the 4,084,813 shares of Alleghany Common stock owned beneficially by Mr. Allan P. Kirby, 528,200 shares are owned by The Allan Corporation, of which Mr. Allan P. Kirby owns all of the outstanding stock. Messrs. Fred M. Kirby and Allan P. Kirby, Jr. are Vice-Presidents of The Allan Corporation. The F. M. Kirby Foundation, Inc., a charitable corporation of which Mr. Allan P. Kirby is president and Messrs. Fred M. Kirby and Allan P. Kirby, Jr. are Vice-Presidents, owned, as of March 1, 1965, 109,314 shares of the Common stock of Alleghany Corporation, 11,500 shares of Class A Common stock, and 77,000 shares of Class B Common stock of Investors Diversified Services, Inc. As of the same date Messrs. Allan P. Kirby, Fred M. Kirby and Allan P. Kirby, Jr. also had an indirect beneficial interest in an additional 9,400 shares of the Common stock of Alleghany Corporation held by a holding company.

Note (5): Allied Properties, a California corporation, owned, as of March 22, 1965, 450,180 shares of the Common stock of Alleghany Corporation. Mr. Odell and his immediate family own 2.72% of the issued and outstanding Common stock, and 8.72% of the issued and outstanding Preferred stock of Allied Properties. State Guaranty Auxiliary Corporation is the owner of 67.02% of the issued and outstanding Common stock of Allied Properties. Mr. Odell and his immediate family own 51.45% of the Common stock of State Guaranty Auxiliary Corporation.

[fol. 58]

Name	Principal Occupation	Previous Service as a Director	Beneficial Stock Ownership as of March 1, 1965
William G. Rabe	President, First Geneva Corporation (investment holding corporation).	1958 to 1961; December 1963 to present	100 shares of Preferred stock, Alleghany Corporation; 500 shares of capital stock, The New York Central Railroad Company.(6)
Daniel E. Taylor	Management of Personal Affairs, Trustee of The Taylor Foundation.	1960 to 1961; December 1963 to present	7,500 shares, Alleghany Common stock; 13,000 shares of capital stock, The New York Central Railroad Company.(7)
Andrew Van Pelt	Management of Personal Affairs.	1948 to 1958; December 1963 to present	2,000 shares of Common stock and 500 shares of Preferred stock, Alleghany Corporation; 7,500 shares of Class A Common stock and 1,000 shares of Class B Common stock, Investors Diversified Services, Inc.; 3,000 shares of capital stock, The New York Central Railroad Company; 550 shares of capital stock, The Pittsburgh & Lake Erie Railroad Company.

Note (6): Mr. Rabe owns 14% of the stock of First Geneva Corporation. First Geneva Corporation owned, as of March 1, 1965, 1,300 shares of Alleghany Preferred stock, 5,000 shares of the Common stock of Alleghany Corporation, and 500 shares of the Class A Common stock of Investors Diversified Services, Inc.

Note (7): As of March 1, 1965, The Taylor Foundation, of which Mr. Taylor is a trustee, owned 1,000 shares of the capital stock of The New York Central Railroad Company.

Alleghany controls Investors Diversified Services, Inc. ("IDS") and its subsidiaries by virtue of its ownership of shares entitling it to 42.75% of the voting rights of that company. Alleghany's holdings of the two classes of Common stock of IDS comprise 28.47% of the equity interest of IDS.

The following table gives the remuneration paid by Alleghany Corporation, The New York Central Railroad Company, Investors Diversified Services, Inc., and their subsidiaries, for the year 1964, to each person whose aggregate remuneration was more than $30,000 and who (i) was a Director of Alleghany Corporation at any time during the year, or (ii) was one of the three highest paid officers of Alleghany Corporation; and to all persons, as a group, who were directors or officers during the last fiscal year.

Name	Capacity in Which Remuneration was Received	Aggregate Remuneration for 1964
Charles T. Ireland, Jr.	President of Alleghany Corporation	$100,000
Clifford H. Ramsdell	Vice President-Corporate Relations of Alleghany Corporation	$ 40,000
Fred M. Kirby	Director of Alleghany Corporation; Director of The New York Central Railroad Company; Chairman of the Executive Committee of Investors Diversified Services, Inc.	$ 31,000(1)
All directors and officers as a group (including the persons and the amounts described above)		$284,451(2)

(1) Of this amount, $2,100 was received from Alleghany Corporation.
(2) Of this amount, $217,662 was received from Alleghany Corporation.

[fol. 59]

[fol. 60]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 29652.

ALLEGHANY CORPORATION, Plaintiff-Appellee,

v.

ALLAN P. KIRBY, CHARLES T. IRELAND, JR. and FRED M. KIRBY, Defendants-Appellees,

MARGARET L. HOLT and KATHLEEN L. McMAHON, Petitioners-Appellants.

Appendix on Behalf of Appellee Alleghany Corporation —Filed April 15, 1965

[File endorsement omitted]

[fol. 62] LETTER OF RETAINER.

April 7, 1965

JAMES W. DEER
30 BROAD STREET
NEW YORK CITY

MESSRS. WILLKIE FARR GALLAGHER
WALTON & FITZGIBBON
1 Chase Manhattan Plaza
New York, N. Y.

Gentlemen:

I am writing you in connection with a development which has occurred in the case of *Alleghany* v. *Kirby*, concerning which you have previously advised the nine members (the "independent directors") of our board of directors who are not involved in it.

As you know, the Alleghany board consists of thirteen directors, three of whom are defendants in this litigation, and a fourth is a relative of two of them. Since the board came into office in December, 1963, all matters relating to this litigation have been handled for the board by the nine members who have no connection with the case, and such legal advice as the corporation has had in the matter has come either from Messrs. Townley, Updike, Carter & Rodgers or from you at the request of the independent directors.

I am advised that an application will be made in this case to the United States District Court for the Southern District of New York, on Thursday or Friday of this week which may require further action by the corporation or by the independent directors.

Mr. Updike has advised counsel for the defendants that he intends to make an application to Chief Judge Ryan for [fol. 63] an order directing the defendants to show cause why two preferred stockholders of Alleghany should not be allowed (1) to intervene in this action for the purpose of making an application to the United States Supreme Court for a writ of *certiorari,* and (2) to have some enlargement of time beyond April 12th, the final day under the Rules of the Court, within which to make such application for a writ. At the Alleghany board meeting on February 9th, the independent directors voted unanimously not to authorize Mr. Updike's firm to apply for a writ, and so advised him the same day.

The defendants, of course, will oppose Mr. Updike's application. Although the firm of Townley Updike Carter & Rodgers are still the attorneys of record for the corporation, that firm obviously cannot adequately or properly represent the corporation in view of the corporation's decision not to authorize an application for a writ, nor effectuate the unanimous judgment of the independent directors that continuation of the litigation is not in the best interests of the corporation.

Because of time limitations, it has not been possible to hold a formal meeting of the Board. However, the independent directors have been canvassed and I am authorized by them to request you to appear before the Court on this application and any related matters on behalf of the nine independent members of the board of Alleghany Corporation, and the corporation, and that you take such steps as you deem necessary or appropriate to protect their interests.

Very truly yours,

JAMES W. DEER

JWD*CR

[fol. 65]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

vs.

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR. and FRED M. KIRBY, Defendants.

Before: Hon. Sylvester J. Ryan, District Judge.

Transcript of Hearing—April 9, 1965

New York, New York,
April 9, 1965,
11:30 P.M.

APPEARANCES:

Willkie, Farr, Gallagher, Walton & FitzGibbon, Esqs., Attorneys for Plaintiff, Mark F. Hughes, Esq., Vincent R. FitzPatrick, Esq. and Allan Conwill, Esq., of Counsel.

Donovan, Leisure, Newton & Irvine, Esqs., Attorneys for the Defendants, Walter R. Mansfield, Esq., John E. Tobin, Esq. and Walter J. Stratton, Esq., of Counsel.

Townley, Updike, Carter & Rodgers, Esqs., Attorneys for the Intervenors, J. Howard Carter, Esq., Lee W. Meyer, Esq. and Ronald S. Daniels, Esq., of Counsel.

[fol. 66]

COLLOQUY AND STATEMENTS BY COUNSEL

The Court: Now I have before me, gentlemen, an order to show cause which I signed yesterday after telephoning both Donovan, Leisure, Newton & Irvine and later Mr. Hughes. Is everybody ready to proceed on the merits of this now?

Mr. Hughes: We are.

The Court: It was brought on at rather short notice because of the urgency of the situation. I appreciate your lawyers' concern that it be done so that you can have a ruling promptly.

Mr. Hughes: Your Honor, before Mr. Carter proceeds, I thought we should file with you a copy of a letter which we have from Mr. Deer which is our authority for appearing here. There has been no formal substitution of attorneys and Townley, Updike & Carter is still attorney of record for the plaintiffs, but we felt that you should have before you a written indication of our authority to appear for the company through these independent directors.

The Court: Well, I don't know. Who is Mr. Deer?

Mr. Hughes: Mr. Deer is one of the independent directors who voted not to proceed with a petition for a writ of certiorari.

The Court: Whom do you appear for on this order to show cause?

Mr. Hughes: For Alleghany Corporation.

The Court: For the corporation?

Mr. Hughes: As a result of the action of these directors in authorizing us to appear.

The Court: I will take it then with the consent of Townley, Updike, they withdraw as attorneys of record for Alleghany Corporation.

You have been paid in full for your services, have you?

Mr. Carter: Yes, we have.

The Court: And that your firm, Mr. Hughes, Willkie, Farr, Gallagher, Walton & FitzGibbon, are now the attorneys appearing for the Alleghany Corporation?

Mr. Hughes: That is correct.

[fol. 67] The Court: Mr. Mansfield, whom do you represent?

Mr. Mansfield: We were counsel for the defendants in the original action and continue to be counsel for the defendants.

The Court: That is the individual defendants, Kirby, Phillips, Ireland?

Mr. Tobin: We represent Mr. Kirby and Mr. Ireland and Fred M. Kirby.

Mr. Meyer: Mr. Phillips is out of the case since no appeal was taken from the dismissal as to him.

The Court: And you are appearing, Mr. Carter, for the two—suppose we call them—petitioners, Margaret L. Holt and Kathleen L. McMahon.

Mr. Carter: That is correct, sir.

The Court: All right.

Now let me hear you first and then I thought the best way would be, if agreeable to everybody, we will hear from Mr. Carter on behalf of the petitioners and then we will hear from Mr. Hughes in behalf of the corporation, and then from you, Mr. Mansfield, or from your partner, Mr. Tobin, on behalf of the individual defendants.

Is that agreeable to everybody?

All right.

Mr. Carter: Judge Ryan and distinguished counsel:

In all frankness, until I think it was Monday of this week, I had believed that this long drawn-out litigation, which is familiarly known as Alleghany vs. Kirby, would probably have a decent interment.

The Court: Apparently it has had the interment but you want to disinter the body.

Mr. Carter: But along came these proposed intervenors who, incidentally, are sisters, Mrs. Holt and Miss McMahon by proper name, and asked us to file this motion seeking permission for them to intervene for the purpose of filing a petition with the Supreme Court for a writ of certiorari. [fol. 68] Now I suppose everyone is bursting with curiosity to find out how Townley, Updike inherited Mrs. Holt and Miss McMahon, and there isn't any secret about it.

The Court: I don't see that it is pertinent but idle curiosity might just as well be satisfied, including the Court's curiosity.

Mr. Carter: I think that is probably right, Judge, and that is my motive in disclosing the genesis of our present relationship.

These women, as their affidavits indicate, for a number of years, certainly during the period in question, have owned a substantial amount of Alleghany preferred and, incidentally, they are and have been friends of a man named Tony Smith, who is pretty well known to most of us, who has been a director of Alleghany for many years, and it was through Mr. Smith's counsel and advice initially that they purchased this Alleghany stock for, as I say, investment.

The Court: Well, they got it for a good price in those days. Mr. Smith gave good advice when he told them to hold on to it.

Mr. Carter: And they appear to be knowledgeable young women and have followed the fortunes or ill fortunes of the Alleghany Corporation through this litigation with pretty close attention. They are very close friends of the mother of one of our young associates, Richard Barnes by name, and apparently last Sunday, in the course of a social visit with Mrs. Barnes, they were discussing the current status of the Alleghany situation and were told by Mrs. Barnes, who has also some familiarity with the matter, that the

Alleghany board had decided not to authorize the filing of a petition for writ of certiorari, which led them to make further inquiry, and the net result of these discussions, which were participated in to some extent by Richard Barnes, is that they came down and asked us to bring this petition on their behalf.

[fol. 69] Now it would appear, for reasons that I will acquaint your Honor with very shortly, that these two proposed intervenors are in the same category of a number of other shareholders of the corporate entity, who can be multiplied by the number that presently exist in their lack of knowledge as to the action which the entity, through its board of directors, took in failing to authorize the filing of a petition for a writ after the four-to-four decision of the Second Circuit in February of this year.

Now, I will be very brief, your Honor, and I know that you have read these supporting papers.

The Court: So that all counsel may be informed I not only read the supporting papers but before I went to the dentist yesterday afternoon—I am having some root canal work done—I examined some of the cases on this subject and then I asked my two able law clerks to continue the research and had the result of their research on this table this morning.

They worked until the late hours of the evening and when I came in this morning at eight o'clock I examined the cases they had gotten out for me, and their notes, so I feel that I am somewhat familiar with the law applicable to the situation presented here by this order to show cause.

Now, so we can orient this matter and bring it down to the fine point of what I regard the issue here to be, you are moving under Rule 24(a), subdivision 2?

Mr. Carter: That is right.

The Court: Which reads that "upon timely application" —note the word "timely"—"anyone shall be permitted to intervene in an action when the representation of applicant's interest by existing parties is or may be inadequate

and the applicant is bound or may be bound by the judgment in the action."

Now I don't think there would be any dispute but that these petitioners or applicants will be bound by the judgment in this action.

[fol. 70] I think the question here is whether or not, No. 1, the application is timely; and, No. 2, whether or not the representation of the applicants' interests by the existing parties is or may be inadequate.

Those are the two matters that are presented to me. If I find that the application is timely and I find that applicants' representation by the existing parties is and will be inadequate, then your application must be granted. If I find that your application is untimely or that the representation is or may be adequate, your application must be denied.

Now you go ahead. Address yourself first to the timeliness of this application.

Mr. Carter: Yes. In order to do so I think I will have to acquaint your Honor very briefly with part of the factual background.

The Court: May I interrupt you a moment?

I think that I should state for the record that this matter came on before me as chief judge and I am taking this over because it was assigned to our late brother, Judge Dawson, and I have been taking over all uncompleted matters in an endeavor to handle them myself, if I can; otherwise to reassign them to another judge.

I felt when this matter came in yesterday that this was a matter that I could conveniently handle along with my other duties and for that reason I retained this matter before me.

Mr. Carter: Well, very briefly, Judge, when this litigation was initiated 'way back in 1960, the fall of 1960, the plaintiffs were the Murchison brothers whom we represented, and, in a sentence, they were seeking to set aside settlements that had been consummated in derivative ac-

tions which were brought by dissident stockholders on behalf of Alleghany against Mr. Kirby and Mr. Ireland and Mr. Phillips and others, on the broad, general ground that the settlements were fraudulent and corrupt.

[fol. 71] In addition, the rationale of one phase of that initial lawsuit had to do with a breach of fiduciary relationship or a claimed breach of fiduciary relationship on the part of Mr. Kirby and others, who, at the time in question, had control of the corporate entity.

Now, as your Honor has stated, it was a Rule 2 case and was assigned to our late lamented and revered friend, Judge Dawson, for all purposes. To skip very rapidly, during the extended interrogations and examinations before trial and discovery proceedings, which I am sure were much too extended and annoying to everybody—

The Court: I think Judge Dawson commented upon 20,000 pages.

Mr. Carter: That is right, and Judge Dawson expressed much displeasure about the length of those depositions; but, in any event, history now indicates that the Murchison Brothers, who were then the plaintiff, succeeded after a proxy contest in obtaining working control at least of the corporate entity, and Judge Dawson quite properly suggested that since they were then in control, that Alleghany be substituted as the plaintiff in that litigation, which was eventually done.

Now, I am going to skip right down to the trial of the law suit—

The Court: I have read Judge Dawson's opinion reported in 218 Fed. Sup. 164.

I have read the Court of Appeals opinion reported in 333 Fed. 2d 327, and the subsequent per curiam reported at 340 Fed. 2d 311.

So you can assume that by reason of that, I am fairly familiar with the background, and besides, I had contact with the case and know something about it because I had examined the file when I designated a Rule 2 judge. But

this was originally filed as a diversity derivative stockholders suit.

Mr. Carter: That is correct.

[fol. 72] Now, after Judge Dawson dismissed the complaint, an appeal was taken to the Second Circuit; and, as I recall it, it was argued before a panel of three judges sometime in December of 1963.

In the meantime, for reasons that are not germane to this issue, the Murchisons decided they would get out from under so far as Alleghany was concerned, and eventually Alleghany returned presumptively to the control of Mr. Kirby.

The two-to-one panel decision affirming Judge Dawson's dismissal of the complaint came down sometime in the spring of 1964, and I believe at or about that time Mr. Kirby was back in control of the corporate entity.

We suggested, Townley, Updike suggested, that because of the magnitude of the sum involved and the dissent, the strong dissent by Judge Friendly, that a petition for a rehearing en banc was in order, and Mr. Updike and myself were invited down to the Alleghany offices to appear before the new board of directors, which was presided over by Mr. Kirby. I would say he was most gracious. There were probably twenty-five members of the board in the room, and they questioned both Updike and myself on the need and advisability, and the reasons why a petition for a rehearing en banc was in order. To sum it up, they voted unanimously in the presence of Updike and myself to authorize Townley, Updike to file such a petition.

That was done. The matter was briefed in extenso, and, as your Honor knows, the Second Circuit came down, I believe it was in late January or early February of this year, and split four to four.

The Court: When you speak of Mr. Kirby, do you refer to one of the defendants, Allan P. Kirby?

Mr. Carter: That is right.

The Court: So he voted in your presence to authorize the filing of a petition en banc in this suit in which he, himself, was a defendant?

[fol. 73] Mr. Carter: That is correct, sir. And I might add that that vote of the Alleghany board at that time authorizing the filing of the petition was unanimous.

When the four-to-four decision came down from the Second Circuit, Alleghany, through Mr. Ireland who is presently the president of the entity, asked for a written opinion by Townley, Updike as to what further steps should be taken in view of that stalemate. That letter was carefully prepared and sent to Alleghany, and I believe the members of the board, and it is a matter of record. In a sentence, we urged Alleghany to file a petition for a writ of certiorari because of (a) the stalemate in the Second Circuit, and (b) the huge amount of money at stake, which would inure to the benefit of the Alleghany shareholders, and (c) the lack of expense involved in filing such a petition.

We were careful to point out to them that, in our judgment, a pretty big hurdle would have to be accomplished before the Supreme Court would grant that writ, but at the same time we were also careful to tell them that, in our considered judgment, if the Supreme Court undertook to hear this issue on its merit, that we thought that there was an excellent chance that they would send it back, remand it for a new trial, enunciating strong standards which must be followed in fiduciary relationships, particularly as they apply to this case.

We understand that at or about that time, the Alleghany board, as certainly was its right, retained the Willkie, Farr firm for the purpose of getting independent advice.

Now, I don't profess to have any knowledge of the advice that was rendered by the Willkie, Farr firm, and frankly I don't know that it is any of my business, although Mr. Deer has indicated that Willkie—

The Court: Gentlemen, don't carry on private colloquy. I have a certain aversion to it.

Mr. Carter: Yes.

[fol. 74] The Court: One of my peculiarities.

Mr. Carter: Mr. Hughes tells me that that opinion of Willkie, Farr is attached to their answering affidavits, which I have not yet seen. So, in any event, it will speak for itself. As I say, it is of no great moment.

But thereafter, sometime after certainly their opinion letter was written to the Alleghany board, we were advised by phone, and I think it was Jim Deer who called, who incidentally is a board member of Alleghany, that—

The Court: I see by his affidavit he is also a member of the bar?

Mr. Carter: Yes, that is right. —that with Mr. Kirby and with Mr. Ireland and possibly others who had some interest absent from the board room and not obviously participating, the board, the Alleghany board, had voted not to authorize a petition to be filed.

We asked them to inform us in writing, which they did.

Now, that was sometime I guess in February or March, I don't know, and there is where the matter stood until Mrs. Holt and Miss McMahon appeared upon the scene.

Now, one thing, your Honor, on the timeliness of this petition, which I think is of great moment, is the fact that, so far as we know—and I think it is the fact—the entity or the Alleghany board at no time either publicly or through the mails advised its shareholders of its decision not to proceed further in the litigation through the medium of authorizing the filing of a petition for certiorari. I have no idea how many shareholders there are in Alleghany Corporation, and I am not even taking the position now that, as a matter of law, the entity had an affirmative duty to either publicize their decision or notify shareholders of what that decision is, but the fact is that in the exercise of their discretion, the directors did not notify the shareholders. And it certainly came as a surprise to these two proposed interveners, as I am sure it did to others who have substantial equities in this corporation, that they de-

cided, in their judgment; not to authorize the filing of this petition.

[fol. 75] Now, the rationale of it—and I am only just thinking out loud here and without resort to any great abstract principles—but retrospectively, here is a company through its board of directors, who, as I said before, very gratiously authorized the filing of a petition for rehearing on this matter en banc. That was done. Thereafter, obviously, a court widely split on a four-to-four basis.

There are all kinds of estimates bandied about as to the amount of the eventual recovery to the shareholders in the event this lawsuit is prosecuted successfully, and figures of forty, fifty and sixty million dollars have been mentioned, but what I don't understand—and I don't say this in any critical spirit at all—is why the directorate of Alleghany didn't remain consistent and authorize the filing of a petition after the four-to-four split, particularly in view of the fact that the expense, all of the expense, had previously been incurred, and the expense involved, as we told them in the letter, for filing a petition would be minimal.

The Court: Perhaps the answer might be found in the opinion, a paragraph of Judge Dawson's opinion deciding this case, in which he referred to this suit as "but another skirmish in the battle of tycoons, Murchison Brothers of Texas on one side and Allan P. Kirby of New Jersey on the other, for control of a rich plum, Alleghany Corporation."

And perhaps they thought that, while they might be prompted in a motive for fighting Murchison Brothers, they have no reason to engage in a skirmish with themselves.

Mr. Carter: Here is what I—

The Court: You like to think out loud, and so do I. Let me do a little thinking out loud, and it may help.

Mr. Carter: Certainly.

The Court: As I read through these opinions, I was first struck by the opening paragraph of Judge Moore on

the appeal reported at 333 Fed. 2d 327. Judge Moore [fol. 75a] starts in, "For some ten years the subject matter of this lawsuit or the lawsuit now on appeal has been before the New York State and Federal Courts."

Now then, following that, I read—I started in perhaps in the inverse order; I should have read the learned opinion of my beloved brother, Judge Dawson, first, but then I read Judge Dawson's opinion, and I was struck with this situation. Here is a corporation where the funds are publicly invested funds that come from the people at large, and the board of directors, irrespective of their personal ownership, they control far less than the majority of the issued stock and they are trustees for public funds.

Now, where you have a corporation such as this, Alleghany, with its checkered background through the years, in the days of the Depression, and it has been involved in litigation for ten or twelve years, I wonder whether it isn't about time that this litigation should be terminated in the interests of the investors, the public who put their money in these companies, rather than have it go on forever.

I don't know whether this Alleghany Corporation needs any financing or not, or whether it has enough monies to operate without additional stock issues or bond issues or what ventures they may be involved in, but you can't close your eyes to facts of common knowledge.

I recall at one time this corporation or somebody affiliated with it bought a substantial share of the stock of the New York Central Railroad. It is common knowledge that negotiations or proceedings are pending looking towards a consolidation of that road with Pennsylvania Railroad, possibly of the combined corporation taking over the freight aspect of the whole New Haven Railroad, and all of these things lead one to believe that as soon as this battle between the so-called tycoons over who should have control of somebody else's money, particularly funds of the public, terminates, the better off it will be for the public. And that is my first impression of this business.

[fol. 75b] Now then, as I read the cases and I read the decisions, it appears that this suit was originally filed as a derivative stockholders diversity suit, and that it brought into question a settlement which had been passed on by the New York State Supreme Court over here in New York County. And it was alleged as a basis of the relief sought here in this particular suit now before us that a fraud had been perpetrated by Kirby and his associates in the accomplishment and the securing the approval of that settlement by the State Supreme Court. Those issues have been adversely determined.

Now, thinking over this problem further, I know—I feel quite sure and if I am in error, you can correct me—that while this settlement over in the State Supreme Court was pending, notice went out to all the stockholders of the contemplated settlement. That is the statutory procedure both in the State Court in a suit of this nature, and frequently in this court. These settlements cannot be accomplished without appropriate notice, due notice.

So that your petitioners must have known of the existence of this suit over in the State Court and must have had notice of its pendency and of the proposed settlement.

Now, the record shows, as I see it, that some stockholders did appear and did object to the settlement over in the State Supreme Court, but among those objecting stockholders were apparently not your clients. So they were content to leave matters go along without intervention, and they didn't intervene.

Now then, when this suit was filed, I assume that enterprising entrepreneurs, such as you represented then, Murchison Brothers, must have in their reports to the stockholders while they were in control of this company, advised the stockholders of the pendency of this suit in this court, which would bring into question the settlement which had been reached and which seems to have been approved in the State Court.

Am I correct in that?

[fol. 75c] Mr. Carter: I think so, generally speaking.

The Court: So your clients knew of this suit pending here and took no steps to intervene.

I don't know whether Murchisons later on, after Judge Dawson's decision, made a report to the stockholders advising them of the result and of the intended appeal, but I assume that again they did so advise, particularly since at that time there were conferences going on between the rival forces for control.

Am I correct in assuming that these stockholders, your petitioners, were advised of Judge Dawson's decision and of the appeal?

Mr. Carter: I would assume all stockholders were.

The Court: It would be fair to assume that.

Now then, going over the record here, can I say now on the eve of the expiration of the time to file a petition for writ of certiorari, that an application by your petitioner is timely made, particularly in view of the fact that you asked to intervene for the purpose of applying for an extension of time within which to file a petition for a writ of certiorari?

There is no undertaking here that they want to file or will file, and there I am confronted with the State decision, the State statutory provision about this being a derivative stockholders suit. A bond might be required; I don't know.

Mr. Carter: No, no final judgment.

The Court: Well, I don't know. I haven't examined that, but what this would mean, if your petitioners had the relief they seek granted to them, is that it would have this practical effect. It would mean that the time to appeal, to file an application for a writ, would be further extended. This writ would most likely not come up before the Court, the Supreme Court, before October, and it would mean that the affairs of this corporation, which have been the subject of litigation now for more than twelve years, would be continued and they would have that

[fol. 75d] uncertainty of management and uncertainty of the future going on for six months more.

Can I say that this application is timely? Now, I have grave doubts about it.

In fact, I have tried to keep my mind open on the subject, and I am thinking out loud so that you might address your future remarks to these questions that come to my own mind.

Now then, coming down to the second obligation that you have to show of your burden that you have to establish—that is on the adequacy of the representation—I can't find any case that holds that, as a matter of law, there must be representation after an affirmance on an appeal. I have looked at the various cases you cite in your order to show cause, and I and my able staff, very competent staff, if I may say so—

Mr. Carter: We agree.

The Court: —have been unable to find any holding on that, that says that adequate representation includes the right to appeal further by attempting to secure a writ of certiorari in the Supreme Court after an affirmance by the Court of Appeals.

I can't find any case on that, and I would be included to feel, as a matter of law, that had this application been timely made after Judge Dawson's opinion, you might well be entitled to intervene for the purpose of appeal. But now, on a possible action of the Supreme Court, I don't feel that, as a matter of law, you have a right to intervene now on the claim that you are not adequately represented.

Also on that, as you recite—you have been very fair in your affidavits, I must say that, as you always are—you say that Kirby and his associates have absented themselves from this vote when they voted not to file a writ of certiorari, and it also appears from that same affidavit that after Kirby and his associates came back into control of Alleghany, they did authorize an application for argument

[fol. 76] en banc. That seems to me to be a very fair indication of adequate representation, and while you, as a zealous advocate, might not feel that a decision of the board of directors of Alleghany now made not to proceed further by filing a petition for a writ is wise, you cannot supplant your decision on business as well as legal matters for their own judgment and the advice they get from their own independent counsel.

The counsel that advised them on this is not the counsel of record, not Donovan, Leisure, who might also be influenced by the zealousness of their advocacy, but it is like bringing in an independent auditor, and Willkie, Farr and Mr. Hughes, a distinguished member of our bar, gave his independent judgment, and I can't say that this is not adequate representation as a matter of law.

These are problems I have, and if you would address yourself to those two problems, I would be very grateful to everybody here. Because of the urgency of this matter, I do not intend to write any opinion, and I have in mind that if any further action is taken with reference to my decision, that my observations and remarks made here at this hearing on the minutes will constitute such opinion as the Court might desire on any review.

Mr. Carter: Let me say by way of brief rebuttal—

The Court: It isn't a rebuttal so much. You proceeded the way I like to see a lawyer proceeding, expressing your thoughts, and as you did so, there was a subconscious expression of your doubts, which perhaps you did not detect yourself, but of which I know you are well advised, having tried many cases before a jury. A jury sometimes senses doubts, the advocate might have in the justice of his own cause, notwithstanding his vociferous protests to the contrary, and so, quite similarly, you put me in the position of a jury listening to a distinguished, able and experienced advocate.

Mr. Carter: Well, as your Honor knows, there is an entirely different approach between one to a judge and one to a jury—

[fol. 77] The Court: Well, not essentially too different. Lots of people think it is different.

Mr. Carter: Well, with a judge we have to stick closer to the facts and the law than with a jury.

The Court: Well, judges like to think that they require that, but they are just as human as anybody else, and lawyers like to feel perhaps that is the way they address the Court, but they are human and they like to create atmosphere, too, whether they are talking to a jury or judge. But let's get back now and stop all this philosophizing.

Mr. Carter: I will be as brief as I possibly can, Judge.

The Court: No, no, I am not hurrying you. You take your time.

Mr. Carter: I appreciate the sentiments you have just expressed, and I think I have assimilated them, although I don't necessarily agree with them, for this reason.

Initially, Judge Dawson felt that when the Murchisons filed this lawsuit back in 1960, that this was sort of a gimmick for a proxy solicitation contest, and I think he inadvertently borrowed that expression from Randolph Phillips, whose principal cry was that this was just a gimmick. But for some reason Judge Dawson—

The Court: We might take judicial notice that he is quite an expert in gimmicks.

Mr. Carter: Yes. Judge Dawson adhered steadfastly to what I always thought was an illusion on his part, and the facts as they developed, insofar as the Murchisons' participation in this whole complex of litigation is concerned, bear out the inevitable conclusion that they were not using this lawsuit as a gimmick for a proxy contest primarily because after they had initiated one and were successful in acquiring control of Alleghany at a tremendous cost, involving many multiples of millions, for reasons best known to themselves, they decided they wanted out, sold their controlling interest to Gamble and others with, I am told, a net capital loss on their part of very, very substantial sums.

[fol. 78] So that this was not of great importance to them, the fact that, to protect the record and I think the facts—

The Court: They might have overreached themselves with their financing.

Mr. Carter: In retrospect, I think in the vernacular, they took a bath in this thing; they paid out a lot of money, a lot of expenses; and they sold their stock for less than they bought it, So I don't think when one is knowledgeable with all of the facts during the period in question, one could properly maintain that this lawsuit initially was a gimmick and a proxy solicitation contest.

The Court: I don't take it that. I don't question the good faith of any of the parties. I have no reason to do that. I have to assume, and I do assume, that all acted in the best of good faith in various suppositions.

Mr. Carter: In all frankness, I don't think that is particularly germane to the problem.

The Court: No, but I assume that all acted in good faith.

Mr. Carter: I don't think it is germane now to the problem we are burdening your Honor with, but I wanted to address myself on the question of the timeliness of this application.

It is true, as your Honor said, that when the Murchisons came into control, they advised the shareholders of the status of the litigation which was then pending with, I suppose, the probabilities of success, and whatever burdens the law puts on controlling stockholders by way of informing shareholders of the litigation the entity is involved in—and obviously these two proposed interveners, who were shareholders at the time, were knowledgeable through these notices of the status of the litigation involving Alleghany, and I would assume that that continued even after the Murchisons relinquished control and Mr. Kirby got back control, and that these two women were knowledgeable as to what was going on.

Now, you see, I think this makes a strong argument for us in that during all of that period, these two women felt

[fol. 79] that their fifty-odd thousand dollar investment was being protected, the matter was being actively litigated, and certainly they were apprised of the fact, I am sure, one way or the other that the Second Circuit split four to four, and I think it is fair to assume that when they got such a notice—and this would apply to all other stockholders—in view of the amount involved, that they must have concluded that Mr. Kirby's liability was a very close question of fact and law.

Now, this was the ninth inning so far as these proposed interveners were concerned in that from that point on, they heard nothing—and I don't say as a matter of law that the directorate of Alleghany had an obligation to notify all of its shareholders of its decision not to authorize the filing of a petition—but I do so on this question of timeliness when the directorate saw fit, in the exercise of its discretion, not to authorize the filing of a petition, I think it did have a corresponding duty to let its shareholders know of that decision. So far as these two proposed interveners are concerned, they were completely in the dark with respect to it, and when they heard about it, as I am told, for the first time on last Sunday, they decided to do what they could to protect their investment.

Now, to me, this is of some pertinence on the question of timeliness because I would assume that there may be hundreds, maybe thousands of other Alleghany shareholders, who would have reacted the same way as these two proposed interveners have acted, had they knowledge of the fact that the directorate of Alleghany had decided not to authorize the filing of this petition.

Now, that is obviously a guess on my part, but when you rationalize it—and this is again not rebuttal to something your Honor said a moment ago—here is a company that has spent a lot of money on legal fees. Townley, Updike was the recipient of some of that largesse.

The Court: I wouldn't say it was largesse. I think that any money that was paid you or your firm was earned.

[fol. 80] Mr. Carter: We would like to think we earned it.

The Court: And the record shows that this was a very bitterly contested litigation, and it was also bitterly contested at the time of the argument en banc.

Mr. Carter: Yes.

The Court: And that notwithstanding the expense of this litigation, it would seem to me as indicative of adequate representation that the directors, including the defendants, voted to authorize an application for argument en banc, and that seems to me a very potent factor here.

Mr. Carter: In this argument here, I have tried to recognize that and tried to give those directors the credits which I believe was due them for that action, but here is where we part company, and it is at this stage I believe that the interests of these proposed interveners and others similarly situated ceased to be protected, because the directorate was knowledgeable of the fact that after the four-to-four decision came down, that the expense involved in filing a petition, so that this baby could be laid to rest with finality once and for all time, would be minimal. And it would appear to me that when they again, in the exercise of their discretion, decided not to authorize the filing of this petition despite the fact that it could be done with very little expense, they became inconsistent, they should have gone the whole way.

You take a fellow to lunch; it has always been my philosophy—don't let him buy his own coat back; go the whole way or not at all.

(Discussion off the record.)

Mr. Carter: But it seems to me that they could have gone the whole way just to prevent what your Honor is confronted with here this morning by two of maybe hundreds of shareholders, and I say that when they decided not to authorize the filing of this petition, this is when these proposed interveners ceased to be protected, and there would be no more expense involved I think whether [fol. 81] the petition would be granted or not, if we were

to get a 60-day extension here, whether the petition could be filed certainly within that 60-day period, be acted upon expeditiously, and if the petition were denied, the ball game is over. If it were granted, then you have another problem, whether or not the Court would decide this on its merits and for what it is worth, and—this is only a guess—I think if the Supreme Court considered this matter on its merits, there would be a remand.

But now there is a big difference between that and getting to the Supreme Court, and as we told Alleghany, we have some doubts about our success in having the petition granted. But where there's life, there's hope.

The Court: Are you through?

Mr. Carter: Yes, sir.

(Discussion off the record.)

Mr. Hughes: May it please your Honor, I think the record already shows that I have submitted to the Court the letter authorizing our appearance.

I think the record also should show that we served our answering papers this morning and also left the originals of those papers with your Honor so that your Honor now has them.

Your Honor mentioned the fact that you had given this application some consideration and had read the moving papers, and you and your staff had undertaken some research.

We submitted the answering papers, including a very short answering memorandum, and I would like to inquire at the outset whether your Honor had an opportunity to read that memorandum. It is very short.

The Court: I only had the opportunity to read such portions as my staff had underlined. As you recall, I didn't come down from the prior hearing until shortly after half past eleven, and my staff apparently had received this memorandum before the hearing began. I had not seen it. It came in after I left to go up on a prior hearing.

[fol. 82] They underlined, number one, "The moving papers do not suggest that the prosecution of the action through the Court of Appeals was impeded in any respect."

Number two, "The moving papers do not even suggest that the decision of the independent directors not to apply for a writ was the result of domination, corruption, fraud, dishonesty or any other venal purpose or motive."

Number three—I am reading you the portions they underlined—"On the moving papers, the fact that this decision was solely the result of the exercise of the judgment of the independent directors that a cessation of the litigation at this stage was in the best interests of the corporation stands undisputed."

Those are the three points that were underlined and the three points I read.

They also underlined that "The basis for intervention when allowed is inadequate representation by the board of directors. This in turn is established by a showing of domination, corruption, fraud or dishonesty, and no such showing was ever attempted here" and it cites a case. I am familiar with the case of Pyle-National Co. v. Amos, 172 Fed. 2d 425.

I also am fairly familiar with the other decisions. The Pellegrino decision I had occasion to read yesterday at 203 Fed. 2d 463, and the other citation, Wolpe v. Poretsky, 144 Fed. 2d 505, I am familiar with.

So that although I haven't read your memorandum in detail, I think I am sufficiently informed as to the substance.

Mr. Hughes: Well, yes. I might also add only that about the only thing—

The Court: It presents no new thoughts to me after our extended research.

Mr. Hughes: Yes. The only other aspect of the memorandum that I would like to call to your attention is that we cite the Swanson case as a single case because it seemed to us not only to express the law, but because it contained [fol. 83] a considerable discussion of the law generally and of other cases.

It seems to me that in view of your Honor's resume of what our brief said, that there is very little for me to say on the point of adequacy, except to point this out, that it is clear on the record that this decision not to proceed any further in the litigation was the result of action by a group of independent directors, who were both a majority and a quorum at the time they took their action. There is no question that their decision was honestly taken. It is not disputed, and the answering papers take the trouble to point out that this group of directors themselves either own or represent some 1,800,000 shares of stock having an aggregate value of some $20 million, so that although there is no attempt to indicate—

The Court: What is the outstanding number of shares?

Mr. Tobin: Approximately ten million, your Honor.

The Court: They represent about 18 per cent?

Mr. Hughes: Yes, that would be right, your Honor, and while there has been no attempt to characterize them as dummies, they certainly are not, and they not only acted according to their best judgment, but their affidavit indicated some of the reasons that motivated them, and in a nutshell, your Honor, it is that those people who are independent of this power play are just fed up, literally fed up with litigation, and they want an end of it, and they don't want any further litigation expense. They want this company to get back to the place where its management can operate its affairs, and where this long period of ten years of litigation is permanently laid to rest.

That decision that they made constitutes the decision of the corporation, and I submit to your Honor that, as a matter of law, these ladies—and I understand they are elderly ladies, and not young ladies—

Mr. Carter: Give them the benefit of the doubt.

(Discussion off the record.)

[fol. 84] Mr. Hughes: I say that what these ladies really are trying to do is to interpose their wishes that this liti-

gation proceed against the wishes and the determination of the board of directors, and I say they may not do that as a matter of law. They may not do that.

They could have come in, and obviously they weren't able to because the facts were against them. They could try to come in and charge these directors acted in some dishonest way, but they didn't. They acknowledged that is not so. And that is the end of it.

The corporation, having decided to drop this litigation, they simply cannot interpose their judgment or attempt to substitute their judgment or ask your Honor really to substitute his judgment by granting this application for the judgment of this board, carefully considered and carefully taken.

The Court: At this stage of the litigation, I agree with you.

Mr. Hughes: Well, I don't press that point any further, and on the question of timeliness, your Honor certainly has said everything on timeliness that needs to be said except for this. I wish I had brought these papers with me, but I didn't. Not only were these notices given, which your Honor refers to, but this whole litigation had widespread publicity, and one of the first things that Mr. Carter said in describing these young ladies is that they were interested in the affairs of this corporation. He said that almost the second or third sentence in his opening remarks, that they were interested in this company and were interested in its affairs and followed its affairs.

Now, if that be so and if they read newspapers at all, and if they are now so agitated about this—they must be pretty sophisticated young or old ladies—they must have seen a lot of the publicity about this case that appeared in the New York Times, in the Tribune, in the Wall Street Journal; in fact, all of the periodicals at every stage of the litigation.

[fol. 85] When it comes to any duty on the part of the board to circularize a notice to stockholders that they have

decided not to apply for a writ, there is absolutely no such duty. And why should they? Having made the decision not to go forward, that was the end of it. There was no occasion to send a notice a minority stockholder to invite them to come in to do the very things belatedly which these ladies are now doing. There was simply no burden on them to do that, so I submit, your Honor, that both as a matter of law, under the rule, they are not entitled to intervention as a matter of right, and I also submit that the application is not timely.

I had expected to allude to such problems as security and that sort of thing, but I don't think I will because in view of the turn the argument has taken, it does not seem to me that is a matter of importance now except it seems to me these two ladies must realize—and I am sure they were told this—that continuing this litigation is going to be a very expensive business, and for the life of me, I can't understand why, with this small investment, at this stage, they are undertaking this kind of a potential expense to themselves with certainly serious risks that they will never be successful, and that they are going to have to stand the freight.

So it seems to me that both as a matter of law and on the basis of timeliness, the application should be denied.

The Court: Mr. Mansfield or Mr. Tobin.

Mr. Mansfield: Your Honor, I have some very definite ideas, but I think that John Tobin, who has lived with this much longer than I have, could perhaps explain it better.

I would just like to say that, as is typical of Mr. Hughes or characteristic of him, as a member of his firm, he has been rather modest on the issue of adequacy of representation in refraining from describing his own very important careful study of this situation back when they were retained by the independent directors to give view on this very issue.

[fol. 86] Attached to Mr. Deer's affidavit in opposition is a rather extensive and thorough opinion letter from the

firm of Willkie, Farr, which certainly made it clear that the independent directors, as they later did, were entitled to exercise their own independent judgment for good sound business reasons in reaching this decision, and if there were anything wrong—and there is nothing really charged so far as their personal behavior is concerned here—then, of course, these two young ladies would have an independent remedy available to them elsewhere. But that is not claimed, or at least there is no suggestion of something wrong.

I think the only other point I would want to make is that we have to look at this in perspective. Even Mr. Carter has said that he would consider the granting of certiorari to involve quite a hurdle here, so that on the issue of timeliness, it would hardly seem fitting for the board to expect that they had to go into detail with the stockholders, which they would have to do, once they raised this question of whether or not to file a petition for certiorari. When you consider what Mr. Carter himself has said, it would only be appropriate for the board whose duty it is to make this kind of a decision, to then turn around and start to spell it out in detail, when there would be no particular point in doing so in some communication with stockholders.

Now, John Tobin is far more acquainted with this than I am, and I would appreciate it if there is anything that he wants to say on this, if your Honor will listen to him.

The Court: It is not my policy to hear two lawyers for the same client, but there are a number of defendants here, and we will hear Mr. Tobin.

Mr. Tobin: Thank you, your Honor. I only want to speak very briefly on the adequacy point.

I may say that that has been a matter of concern not only to the independent directors, but to the defendants as well, because they do represent in their capacity as presi- [fol. 87] dent and chairman of this corporation, all of its stockholders.

Your Honor has already referred to the fact that this case, from the standpoint of the public stockholder, has been given every consideration throughout. It was very carefully worked out that the original appeal of this case was argued to the Second Circuit before Mr. Kirby came back into control.

When the question of reargument was presented to the board, Mr. Updike and Mr. Carter appeared before the board. They were fully heard. The board unanimously voted, including the defendants, to authorize reargument.

After the Second Circuit affirmed on reargument, the independent directors went to the Willkie firm, as they had on the reargument question itself. The Willkie firm's prior connection with this corporation had been one occasioned by the original plaintiff in this action, Murchison Brothers. So that it is clear, as your Honor has noted, that there has been a very determined effort to insure that the public stockholders were adequately represented with respect to this case.

Another aspect of the life of Alleghany to which your Honor has already directed attention is the fact that this is a corporation which has been involved in controversy and litigation for years. Today for the first time, it has on its board public stockholders who represent substantial amounts of money not belonging to some person temporarily or permanently in control of the company. These public corporations which have invested in Alleghany are represented on the board together with other public stockholders by a majority of the board, and it is those nine men who have made this decision that they are fed up with litigation, they would like this corporation to go on and do its business, and they are satisfied on the basis of their investigation and the actions of all of the courts here, that this litigation should now end.

The Court: Do you want to say anything further, Mr. Carter?

[fol. 88] Mr. Carter: I don't think so, Judge. Maybe Mr. Meyer has a thought that he could get off his chest very briefly.

The Court: All right.

Mr. Meyer: Your Honor, I think there are two points to be made.

First, as to the adequacy of the representation, the fact remains that no matter what we hear of the independence of the members of the board, that Mr. Kirby has the power to nominate and elect that board. He owns in excess of 42 per cent of the stock personally.

His lawyer, Mr. Whittlesey, a partner of Mr. Mansfield and Mr. Tobin, stated in an affidavit to the Second Circuit that he, Mr. Kirby, was being returned, direct control was being returned to Mr. Kirby, and under those circumstances it would seem that, as far as the adequacy of the board decision is concerned, we don't question the integrity of the men involved, but we do have the fact that the litigation is again in a posture of Mr. Kirby being on both sides of it, 40 per cent owner in the corporation and the corporate claim is going by the board.

Now, Judge Friendly took note of this fact, and in the last sentence of his opinion in dissent in the Second Circuit, he stated that:

> "I would therefore reverse the judgment dismissing the complaint and, as the defendants should have an opportunity to meet the evidence that was erroneously excluded, remand for further hearing. Since Kirby has regained control of Alleghany, I would instruct the judge to make provision for the continued prosecution of the action free from any control by the present directors."

The present directors that Judge Friendly had reference to are the very same directors who are represented here by Mr. Hughes. The board directors are the same.

Now, as to the timeliness of this application, these ladies up until the petition for certiorari were adequately

[fol. 89] represented. This litigation started in 1954, the underlying litigation started in 1954.

There was a proposed settlement. There was an objection to that settlement. The settlement was consummated and then it was attacked as having been fraudulently arrived at.

Then Alleghany itself took over the litigation and prosecuted the action and then the board of directors voted to appeal, and again voted for rehearing.

Now the considerations have not changed, and I think it is fair to question the basis for the decision of the board of directors, although you don't need to do so because of Mr. Kirby's stock ownership. The basis of the considerations that were present when a rehearing was voted was a two-to-one decision adverse to the corporation. Since that time the corporation's posture has improved. It is now four-to-four.

So one wonders whether or not the basis of decision was solely on the fact that we now want to end this litigation once and for all. There has yet to be an airing in a court of the basic claim involved here. The basic claim goes all the way back to 1949 and it has never been litigated in a court of law.

There have been settlement hearings on it, and this whole litigation has been a prolonged effort to try to litigate that claim on the merits.

There are at least four judges of the Court of Appeals that think that Alleghany has $61 million coming out of that claim and that Mr. Kirby is liable for it.

I think the opinions of the Court of Appeals make it clear that the issue here is whether the corporation is finally to get to litigate that claim on the merits and up until now this case has been an effort to do that.

And now when Mr. Kirby again is in control of the corporation with the stock ownership and the power to nominate or fire these directors, I don't think it can be said, as a matter of law, that the representation is clearly adequate.

[fol. 90] The Court: Well, are your applicants entitled to representation at this stage of the litigation after an affirmance on appeal? Can you cite me one case where intervention was permitted after an affirmance on an appeal?

Mr. Meyer: I think, your Honor, that since the Pellegrino case is perhaps as far as any case has gone in this matter, that you probably should not decide that the corporation or that the shareholders coming in now have no right to intervene, to go forward, to appeal. Now, Pellegrino admittedly involved a Court of Appeals situation. We are here concerned with an extension of that to the Supreme Court situation.

But if you deny this application, the right is gone and it seems to me that the very least that can be done by this court to protect the shareholders—and we suggest that they do have intervention as a right situation—that the very least that you can do to protect the shareholders and all others similarly situated is to grant them intervention for purposes of applying for an extension of time and we will attempt to air this matter in the Court of Appeals, as to whether or not they should be allowed to intervene as a matter of right.

If you deny it flatly, the right will be gone in the Supreme Court of the United States because it is a jurisdictional matter.

The Court: You can appeal from my decision and I am going to give you a decision right away.

Mr. Meyer: The problem is that we would have to file an application for an extension of time by Monday.

The Court: I think you can go right upstairs to the Court of Appeals now and ask them for any relief you want.

The matter was presented to me yesterday morning. With the consent of all parties I gave counsel an adjournment on the hearing, or they consented that it be put on today. I was willing to hear the matter yesterday. I have heard it now. I am ready to decide it now and will file my [fol. 91] opinion, and you can take it right up to the Court of Appeals now.

I would feel much happier if you did that. I will endorse the papers in this manner: "Because of the urgency of the situation presented by this application, I have written no opinion."

To sit down and write an opinion, it is going to have to be about ten pages, even five pages boiling it down, and it would have to be typewritten, and you wouldn't get it filed until tomorrow or maybe Monday.

I am giving you a decision now. I am endorsing the papers:

"Because of the urgency of the situation presented by this application, I have written no opinion. See reporter's minutes of hearing held. I find and conclude that the within application is not timely made and that the applicants have had and do have adequate representation. This application is denied. So ordered."

Now that gives you an opportunity to go right upstairs. Maybe counsel will accommodate you and accompany you. If you are going upstairs, I will have the clerk take these papers right upstairs with you.

Do you desire me to do that?

Mr. Hughes, are you willing to go up with Mr. Carter?

Mr. Hughes: Yes, your Honor.

The Court: Mr. Mansfield and Mr. Tobin?

Mr. Mansfield: If Mr. Carter wants to go. I don't want to go by myself.

Mr. Hughes: I wasn't pausing for lack of willingness. It seemed to me that it was not our decision to make.

The Court: No. Counsel have been most cooperative in this whole hearing and ordinarily this would call for at least two or three pages of an endorsement.

[fols. 92-107] I have reached the stage where I don't write too much if I can help it because I think we have got enough law books at the present time.

Mr. Daniels: May we confer for a moment?

The Court: Certainly. Go outside and confer.

I would feel much happier if you went up. You know that.

(Recess)

Mr. Carter: Your Honor, we have discussed it among ourselves and as we see it, by doing nothing in the face of your Honor's ruling, the ballgame is over.

The Court: That is right.

Mr. Carter: We have concluded that we sort of have a responsibility to see this thing through, and we will go to the Court of Appeals' office for the purpose of trying to initiate something this afternoon whereby we could seek an order of intervention for the limited purpose of making an application to extend the time, and then if they—

The Court: I think your decision is a wise one. It is one that I would make.

Mr. Carter: If that could be granted, it could be argued on the merits as to our right to intervene.

The Court: That is what I would prefer you to do personally, but you are the one to make the decision.

(Discussion off the record.)

[fol. 108]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

JOHN D. MURCHISON and
CLINT W. MURCHISON, JR., etc., Plaintiffs,

v.

ALLAN P. KIRBY, et al., Defendants.

ORDER REFERRING CASE—FEBRUARY 16, 1961

The above action is hereby referred to the Honorable Archie O. Dawson, United States District Judge, for all purposes.

Dated: February 16, 1961.

Sylvester J. Ryan, Chief Judge

[File endorsement omitted]

[fol. 109]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

JOHN D. MURCHISON and CLINT W. MURCHISON, JR., co-partners, doing business as Murchison Brothers, and GERARD L. FOSSLAND, as stockholders of Alleghany Corporation, on behalf of themselves and all other stockholders similarly situated, Plaintiffs,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, FRED M. KIRBY, CHARLES T. IRELAND, JR., CHARLES T. HILL, ALFRED E. PERLMAN, WILLIAM G. RABE, JOSEPH M. FITZSIMMONS, ANTHONY SMITH and ALLEGHANY CORPORATION, Defendants.

NOTICE OF MOTION—Filed June 15, 1962

Sirs:

Please Take Notice that upon the annexed affidavits of James B. Donovan, sworn to June 13, 1962, and Stuart N. Updike, sworn to June 12, 1962, and the exhibits thereto and upon the pleadings in this action and all prior proceedings had herein, defendant Alleghany Corporation will apply to the Honorable Archie O. Dawson, in Chambers, Room 2102, United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 25th day of June, 1962, at 10:30 o'clock in the forenoon of that day pursuant to Rules 15, 17, 21 and 25 of the Federal Rules of Civil Procedure and the powers of this Court to regulate the form and conduct of proceedings before it for an order:

(a) Granting leave to Alleghany Corporation to prosecute this action and authorizing the substitution

of Alleghany Corporation as plaintiff in the place and [fol. 110] stead of John D. Murchison and Clint W. Murchison, Jr., co-partners doing business as Murchison Brothers and Gerard L. Fossland;

(b) Granting leave to Alleghany Corporation to file an amended and supplemental complaint herein substantially in the form of the proposed pleading submitted herewith;

(c) Dropping Fred M. Kirby as a party defendant and Charles T. Hill, Alfred E. Perlman, William G. Rabe, Joseph M. Fitzsimmons and Anthony A. Smith as named defendants;

(d) Amending the caption of this action to read as follows: "Alleghany Corporation, Plaintiff, against Allan P. Kirby, Randolph Phillips and Charles T. Ireland, Jr., Defendants"; and

(e) Granting such other further and different relief as the Court may deem proper.

Please Take Further Notice that any opposing affidavits and answering memoranda of law must be served no later than 12:00 noon on June 21, 1962.

Dated: New York, New York, June 13, 1962.

Yours, etc.

Watters & Donovan, By Edward V. Gross, A Member of the Firm, Attorneys for Alleghany Corporation, 161 William Street, New York 38, New York.

To:

Donovan, Leisure, Newton & Irvine, Attorneys for Allan P. Kirby and Fred M. Kirby, 2 Wall Street, New York 5, New York.

[fol. 111]

Kissam & Halpin, Attorneys for Charles T. Ireland, Jr., 120 Broadway, New York 5, New York.

Randolph Phillips, Pro Se, 128 East 70th Street, New York 21, New York.

[File endorsement omitted]

[fol. 112]

ATTACHMENT TO NOTICE OF MOTION

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 60-3511

[Title omitted]

AFFIDAVIT OF JAMES B. DONOVAN

State of New York,
County of New York, ss.:

James B. Donovan, being duly sworn, says:

1. I am a member of the Bar of the State of New York and this Court and a member of the firm of Watters & Donovan, attorneys for Alleghany Corporation (hereafter "Alleghany"), on whose behalf this shareholders suit has been brought. I make this affidavit upon information furnished to me by various counsel to parties in this litigation which information I believe to be true, upon documents, court records, and other papers, copies of which have been furnished to me and which I believe to be accurate copies of the originals, and upon the testimony of the parties and witnesses who have been deposed in this action.

[fol. 113] 2. This affidavit is submitted in support of Alleghany's application for an order, pursuant to Federal Rules

15, 17, 21 and 25 and the powers of this Court to regulate the form and conduct of proceedings before it, (a) granting leave to Alleghany to prosecute this action and authorizing the substitution of Alleghany as plaintiff in the place and stead of John D. Murchison and Clint W. Murchison, Jr., co-partners doing business as Murchison Brothers and Gerard L. Fossland; (b) granting leave to Alleghany to file an amended and supplemental complaint herein substantially in the form of the proposed pleading submitted herewith; (c) dropping Fred M. Kirby as a party defendant and Charles T. Hill, Alfred E. Perlman, William G. Rabe, Joseph M. Fitzsimmons and Anthony A. Smith as named defendants; (d) amending the caption of this action to read as follows: "Alleghany Corporation, Plaintiff, against Allan P. Kirby, Randolph Phillips and Charles T. Ireland, Jr., Defendants"; and (e) granting such other further and different relief as the Court may deem proper.

3. The present complaint in this action was filed on September 8, 1960 by minority shareholders suing in the right of Alleghany, when defendant Allan P. Kirby (hereafter "Kirby") was Chairman and the Board of Directors and President, (as well as the largest single stockholder) of Alleghany, defendant Charles T. Ireland, Jr. (hereafter "Ireland") was Vice-President and a director of Alleghany and defendant Randolph Phillips (hereafter "Phillips") was a salaried director of Investors Diversified Services, Inc., (hereafter "IDS") and a paid consultant of Alleghany. [fol. 114] Other than the foregoing persons, the only person who has been served herein is Fred M. Kirby, a member of the former Board of Directors of Alleghany.

4. Alleghany, an indispensable party to this action, was named and served as a defendant because defendant Kirby's effective working control of the corporation made futile any demand upon the former Board to commence the action.

5. The pleading of Alleghany presently on file in this action is an amended answer filed on October 26, 1960 by Alleghany's former attorneys herein, Messrs. Kissam and Halpin. Said amended answer generally denies the allegations of the complaint and asserts various affirmative defenses. It parallels in most respects the answer filed on behalf of defendant Ireland, whom Messrs. Kissam and Halpin have continued to defend throughout this litigation. Alleghany, while said firm represented it, actively opposed this litigation.

6. The circumstances in which the aforesaid pleadings were filed changed materially in the Spring of 1961; defendant Phillips resigned his positions with IDS and with Alleghany and after a proxy contest the Alleghany shareholders ousted defendants Kirby, Ireland and the other incumbent directors of Alleghany. Thus certain conditions affecting the management of IDS which the present complaint sought to rectify were eliminated, as was the hostility and prejudice of Alleghany management towards the claim asserted in said complaint.

[fol. 115] 7. Only two members of the newly elected Alleghany Board of nine directors, Messrs. John D. Murchison and Clint W. Murchison, Jr., plaintiffs herein, were generally familiar with the background of this litigation, the complicated issues involved in it, and the facts brought to light in the discovery proceedings had herein prior to May 23, 1961, the date on which the new Board took office. In considering the part Alleghany should take herein, the Board was aware of Judge Weinfeld's decision of January 30, 1961 denying defendant Phillips' motion to strike the complaint as sham, for judgment on the pleadings, and for summary judgment, but it chose not to make its determination solely upon the basis of said decision. After being informed that attorneys for the plaintiffs herein had so recommended, the Board resolved at its meeting of June 14, 1961, to retain independent counsel to make an objective analysis of this litigation (and other related actions) and to

report their recommendation as to the part Alleghany should take herein. Counsel was directed to adopt a neutral role pending the completion of their analysis and report. The resolution adopted by the Board further directed that such independent counsel "be one having no conflict of interest by reason of any present or prior representation of, or association with, this company or its directors or officers or any other party to" this litigation. In accordance with the foregoing resolution my firm was substituted as counsel for Alleghany.

[fol. 116] 8. This court will recall that during the period of more than twelve years commencing with the inception of the earliest transaction complained of in the prior derivative actions and terminating when the new Board took office on May 23, 1961, Alleghany was controlled first by Robert R. Young and defendant Kirby and subsequently by defendant Kirby alone. Thus records of Alleghany relevant to the matters complained of in the proposed complaint first became available for independent inspection and analysis on May 23, 1961. From this material and from the continually expanding testimony and exhibits in this case, it was necessary to assemble, study and digest what was essential and relevant to the fraud alleged herein, the merits of the claims asserted against Kirby in earlier derivative actions, *Zenn, et al.* v. *Anzalone, et al.*, (Sup. Ct. N.Y.Co. Index No. 7244/1954), (hereafter *"Zenn* (State)"), *Zenn, et al.*, v. *Anzalone, et al.*, (SDNY Civil Action No. 92-205), (hereafter *"Zenn* (Federal)") and *Breswick & Co., et al.* v. *Briggs, et al.*, (SDNY Civil Action No. 92-371), (hereafter *"Breswick"*), the value of such claims and the rights and duties of Alleghany with respect to the prosecution of this litigation.

9. My firm's study and analysis have led us to conclude with respect to the foregoing problems:

(a) that the allegations of conspiracy and collusion among Kirby, Ireland and Phillips with which this

Court is familiar are supported by evidence now in the record, and that certain related acts of concealment by Kirby and Ireland which are alleged in the pro-
[fol. 117] posed complaint also constitute grounds for setting aside the separate Kirby settlement of the said earlier derivative actions;

(b) that the claim asserted against defendant Kirby in *Zenn* (State and Federal), based on a transaction wherein Kirby and others exchanged Alleghany Preferred stock held by them for securities held in Alleghany's portfolio (IDS non-voting stock) involves a voidable self-dealing transaction of a nature uniformly condemned by the courts (said transaction being hereinafter and in the proposed complaint referred to as the "1950 Exchange Transaction");

(c) that there was a disparity of many millions of dollars between the value of the claim based on the 1950 Exchange Transaction and the amount Kirby paid in settlement of all claims asserted against him in the earlier derivative actions;

(d) that under these circumstances Alleghany has the right and the duty to assume control of and to prosecute this litigation.

[fol. 118] 10. Accordingly, my firm recommended to Alleghany that it apply to this Court for leave to prosecute this litigation and for leave to file an amended pleading. We further recommended that if such application should be granted by this Court, Messrs. Townley, Updike, Carter and Rodgers be substituted herein as attorneys for Alleghany. At its meeting on April 11, 1962 (Messrs. John D. Murchison and Clint W. Murchison, Jr. absenting themselves from the meeting and taking no part in the consideration of or action upon this matter) the Alleghany Board of Directors resolved to authorize the recommended action. This application is made pursuant to the aforesaid resolution.

11. In accordance with the recommendation of my firm the proposed complaint submitted herewith generally sets forth in Count I the essential facts upon which Alleghany relies to set aside the Kirby settlement of said earlier derivative actions, or in the alternative, to recover from Kirby for Alleghany's loss of its right to rescind the 1950 Exchange Transaction, and sets forth in Count I and in Counts II, III, IV and V the facts showing Kirby's liability on said transaction. The latter Counts seek rescission of the 1950 Exchange Transaction as to Kirby and damages by reason of Kirby's joint liability in connection with said Transaction. The proposed complaint also sets forth the facts upon which Alleghany relies to recover from Kirby amounts paid by Alleghany for his attorneys fees and expenses in defending the earlier derivative actions and this action (Counts I and VI); and to recover from Ireland [fol. 119] the amounts paid by Alleghany for his attorneys fees and expenses in defending this action (Count I); and to recover from Kirby, Ireland and Phillips such amount as may be ordered or adjudged against Alleghany with respect to plaintiffs' attorneys fees herein incurred to date on Alleghany's behalf (Count I).

12. Thus the proposed complaint defines and narrows the issues in this action, eliminating claims against Kirby asserted in the earlier derivative actions which Alleghany does not seek to relitigate. Most of the allegations in the proposed complaint, which are not in the present complaint, deal with violations by defendant Kirby and others of their fiduciary obligations in connection with the 1950 Exchange Transaction and its unfairness to Alleghany, with the fact that Alleghany never consented to it by valid act of its Board of Directors or its stockholders; and with the fact that it was conceived and carried out in violation of the common law of Maryland and New York and in violation of the federal securities laws.

13. It is also alleged in the proposed complaint that many essential facts material to an adequate appraisal of

the 1950 Exchange Transaction remained concealed from its inception throughout the *Zenn* and *Breswick* proceedings in the State and Federal Courts, the negotiations leading to the separate Kirby settlement and the selection by Kirby of Phillips for election to the IDS Board, the election of Phillips, and the subsequent purported final judgment [fol. 120] in *Zenn* (State).

14. Related but separate acts of concealment are alleged in the proposed complaint to have taken place after the publication of the Report of the Referee appointed in *Zenn* (State):

(a) It was apparent on the face of said Report that the Referee relied on a provision purported to be in the Alleghany Certificate of Incorporation, which was not in fact in said Certificate, to reach a finding that the self-dealing transaction had been authorized by the Alleghany Board of Directors, as follows:

> "Objectants also complain of the absence of a quorum at Alleghany's Board meeting of December 6th, 1949, at which the IDS transaction was approved. At the time of that meeting, Alleghany had ten directors. The resolution approving the IDS transaction was adopted unanimously by the seven directors who were present. Four of those present, namely, Young, Kirby, Purcell and Anzalone, had a personal interest in the transaction. The three disinterested directors were less than one-third of the ten members of Alleghany's Board. However, Alleghany's Certificate of Incorporation provided at the time, in Article Eighth, 'that a director who was financially interested in a contract or transaction with the corporation may be counted in determining the existence of a quorum at any meeting, and may vote to authorize such contract as if he were not personally interested.'
>
> Accordingly, the fact that four of the directors had a personal interest did not destroy the existence of a

quorum." Report of Referee in *Zenn* (State) dated November 17, 1958, p. 58.

The language quoted by the Referee is nowhere to be found in the Alleghany Certificate. The applicable article of the [fol. 121] Certificate, which is annexed to the proposed complaint as Exhibit C, contains no provision permitting directors to be counted in determining the existence of a quorum or permitting them to vote upon a transaction—in other words to be the directors who authorize that transaction on behalf of Alleghany—when such directors are dealing personally for themselves with Alleghany, as did Kirby and his three fellow officer-directors in the 1950 Exchange Transaction. The proposed complaint alleges that Kirby failed to disclose said error of the Referee to Alleghany or to the Courts in violation of his fiduciary obligation to do so.

(b) The proposed complaint alleges that further violation of Kirby's fiduciary obligations took place after the publication of the Referee's report in that Kirby, his counsel and Ireland, whom Kirby and his counsel chose to act as Alleghany's counsel, failed to disclose facts withheld from the Referee which were material to an adequate appraisal of the 1950 Exchange Transaction and inconsistent with the Referee's findings and conclusion with respect to said Transaction.

15. Submitted herewith in support of this application is the affidavit of Stuart N. Updike, a member of the firm of Townley, Updike, Carter and Rodgers, and annexed as an exhibit thereto is the proposed amended and supplemental complaint.

Wherefore, it is respectfully submitted that this appli- [fol. 122] cation should be granted in all respects.

James B. Donovan

Sworn to before me this 13th day of June, 1962.

Patrick J. Hughes, Notary Public, State of New York, No. 03-7000350, Qualified in Nassau County, Cert. filed in New York County, Term Expires March 30, 1964.

(Seal)

[fol. 123]

ATTACHMENT TO NOTICE OF MOTION

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

[Title omitted]

AFFIDAVIT OF STUART N. UPDIKE

State of New York,
County of New York, ss.:

Stuart N. Updike, being duly sworn, says:

1. I am an attorney at law and a member of the firm of Townley, Updike, Carter & Rodgers, attorneys for plaintiffs herein. I have participated in this litigation since its inception and am familiar with the proceedings since then.

2. As appears from the moving affidavit of James B. Donovan, Esq., of the firm of Watters & Donovan, said firm was retained as attorneys for defendant Alleghany Corporation (hereafter "Alleghany") in June, 1961 to make an objective analysis of this litigation (and other related actions) and to report their recommendations as to the [fol. 124] part Alleghany should take herein. From said affidavit it further appears that Watters & Donovan recommended to Alleghany that it apply to this Court for leave to prosecute this litigation and for leave to file herein an amended and supplemental pleading. After consulta-

tion with Watters & Donovan, my firm prepared a first draft of a proposed amended and supplemental complaint for consideration by Watters & Donovan. The proposed amended and supplemental complaint annexed as an Exhibit to this affidavit is a revised version of my firm's draft.

3. As also appears from the Donovan moving affidavit, said firm recommended to Alleghany, and the Alleghany Board approved the recommendation, that, if the application for leave to file the proposed amended pleading were granted by this Court, this firm should be substituted herein as attorneys for Alleghany. Accordingly, I make this affidavit in support of Alleghany's application for an order:

(a) Granting leave to Alleghany to prosecute this action and authorizing the substitution of Alleghany as plaintiff in the place and stead of John D. Murchison and Clint W. Murchison, Jr., co-partners doing business as Murchison Brothers and Gerard L. Fossland;

(b) Granting leave to Alleghany to file an amended supplemental complaint herein substantially in the form annexed hereto as Exhibit A;

(c) Dropping Fred M. Kirby as a party defendant and Charles T. Hill, Alfred E. Perlman, William G. Rabe, Joseph M. Fitzsimmons and Anthony Smith as named defendants;

(d) Amending the caption of this action to read as follows: "Alleghany Corporation, Plaintiff, against Allan P. Kirby, Randolph Phillips and Charles T. Ireland, Jr., Defendants"; and

(e) Granting such other and further and different relief as to the Court may deem proper.

[fol. 125] The motion is made pursuant to authorization by the Board of Directors of Alleghany, acting upon the advice of counsel

4. Since Mr. Donovan's affidavit is addressed principally to Alleghany's taking over the prosecution of this action as plaintiff, this affidavit will be addressed primarily to those aspects of the motion which seek leave to file an amended complaint and the absence of prejudice to defendants in connection with such leave.

The Present Complaint

5. As more fully appears from the complaint herein, this suit, commenced September 8, 1960 by the Murchisons and Fossland as stockholders of Alleghany, seeks in Count I to nullify a separate settlement pursuant to which Kirby, upon the payment by him of $1,100,000, was released by Alleghany of all claims asserted against him in certain prior derivative actions. The complaint alleges that the separate Kirby settlement was the product of a conspiracy and corrupt agreement among Kirby, Alleghany's President, Chairman of the Board and Chief Executive Officer, Ireland, its Executive Vice President, and Phillips, under which Kirby was released from liability to Alleghany for a sum substantially less than that which he would have had to pay for said agreement.

6. In connection with discovery under said allegations that Kirby settled for a substantially lesser sum, this Court made rulings as to the scope of inquiry. On April 18, 1961, [fol. 126] Archie O. Dawson, U.S.D.J., ruled as follows (transcript 4/18/61, p. 35):

> "One of the issues as to whether it was an improper settlement is whether Mr. Kirby thought he had a liability greater than the special master found he had."

And, in ruling on a particular question that Kirby had not answered, concerning one of the underlying claims, the Court, in directing him to answer, stated (p. 39):

> "The reason for it is this: They said that Mr. Kirby had certain liability to Alleghany Corporation grow-

ing out of these New York Central transactions. They say he settled that liability for less than what the true liability was by a deal with Mr. Phillips. Therefore they have a right to inquire as to what his liability was on that New York Central."

Thus, Kirby, who had not been a witness in the underlying derivative actions, has been questioned in this action with respect to the facts of those claims asserted against him.

Subsequent Developments

7. Since the filing of the original complaint on September 8, 1960, several important events have occurred which argue for amendment of the pleadings. Thus, the Kirby management, after a proxy contest, was ousted by the shareholders of Alleghany at the annual meeting begun May 1, 1961 and completed May 23, 1961. Randolph Phillips was not renominated for the IDS Board elected at the annual meeting of that corporation in April of 1961. I am informed that Phillips' services to that corporation were terminated as of June 28, 1961, and that his consultantship to Alleghany was terminated as of March 31, 1961.

[fol. 127] The Amended and Supplemental Complaint

8. The purpose of the amended and supplemental complaint, apart from Alleghany's taking over the action, is: to adjust the original pleading to drop Count II as made moot by the events of the Spring of 1961; to drop Alleghany directors named but not served as defendants; to drop Fred M. Kirby as a named and served defendant; to plead certain breaches of fiduciary duty and illegal conduct of Kirby which gave rise to the liability he sought to evade by his fraudulent settlement; and to relate the relief sought to said charges.

9. The proposed complaint is supplemental to the limited extent (a) that it pleads in the first 14 paragraphs the change in the position of Alleghany with respect to this litigation subsequent to the filing of the original complaint; and (b) that Count VI seeks an accounting for attorneys' fees Kirby caused Alleghany to pay on his own behalf and on behalf of others.

Parties Omitted

10. The decision of Alleghany to seek leave to take over this litigation which had been instituted in its behalf renders the previous stockholder plaintiffs superfluous. Accordingly, I have been authorized by each of the plaintiffs herein to state that, if the leave sought is granted, they consent to the substitution of Alleghany in their place and stead as party plaintiff.

11. Alleghany's assumption of the prosecution of the action also makes it unnecessary to continue to name as defendants persons who were directors of Alleghany at [fol. 128] the time this suit was instituted. These persons are Charles T. Hill, Alfred E. Perlman, William G. Rabe, Joseph M. Fitzsimmons and Anthony Smith. None of them was served with process and none has appeared herein. They may now be dropped as named defendants.

12. Fred M. Kirby was served with process, has appeared and has actively defended in this action although there is no allegation that he personally profited from the transactions under attack. I believe that he need not now be continued as a defendant in order to afford Alleghany complete relief as plaintiff in this action. Hence, Fred M. Kirby should not be put to the expense of defending this action on the theory of the present complaint that he had vicarious liability as a corporate director. Accordingly, he should be dropped as a party defendant without costs.

Omitting Count II of the Complaint as Moot

13. Count II of the complaint sought in effect to enjoin Phillips from acting as a director of IDS or having any connection with IDS or Alleghany, to enjoin Kirby from interfering with the exercise of independent judgment and discretion by the directors of both Alleghany and IDS, and to require an accounting by Kirby, Ireland and Phillips for the damage caused to Alleghany by their activities. In view of subsequent developments, including those referred to in paragraph 7 above, the relief sought in Count II, to the extent it was not duplicated in the prayer under Count I, has become moot and the allegations thereof have accordingly been dropped from the proposed amended and supplemental complaint.

[fol. 129] Absence of Prejudice to Defendants

14. As heretofore noted, Kirby already has been interrogated with respect to the 1950 Exchange Transaction. I do not believe that additional oral examination will be required of him by Alleghany. Moreover, neither Ireland nor Phillips was an officer or employee of Alleghany at the time of the 1950 Exchange Transaction. Hence, no further deposition testimony in that regard need be sought from them.

15. Undoubtedly, Alleghany will wish to take the depositions of certain persons connected with the 1950 Exchange Transaction. Defendant Kirby probably will also seek to take certain depositions in that connection. These depositions, however, are necessary under the original complaint and would have been taken in any event to establish the unfairness of the separate Kirby settlement in keeping with the allegations of that complaint. The number and length of such depositions will in all events be far less than the number and length of depositions which are eliminated by the proposed complaint.

16. None of the pretrial proceedings to date is affected to any substantial degree by the amended pleading. More-

over, defendants have noticed approximately twenty depositions arising from the allegations in Count II of the present complaint to be taken in various parts of the country. Those depositions, of course, will become unnecessary under the proposed complaint. An appropriate motion to vacate those notices of deposition will be made, if necessary, in the event the present motion is granted.

[fol. 130] Conclusion

17. In the light of the facts alleged in the moving affidavit of James B. Donovan and of the facts hereinabove set forth, it is respectfully requested that an order be made granting the relief sought on this motion.

Stuart N. Updike.

Sworn to before me this 12th day of June, 1962.

Adelaide R. O'Neill, Notary Public, State of New York, No. 03-8221185, Qualified in Bronx County, Cert. filed in New York County, Commission Expires March 30, 1964.

[fol. 131] Proof of Service (omitted in printing).

[fol. 131a] Acknowledgment of Service (omitted in printing).

[fol. 132]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Endorsement

60 Civ. 3511

JOHN D. MURCHISON, ET AL.

v.

ALLAN P. KIRBY, ET AL.

ORDER SUBSTITUTING ALLEGHANY CORPORATION AS PLAINTIFF, ETC.—June 26, 1962

So much of the motion as seeks leave to substitute Alleghany Corporation as plaintiff in place of John D. Murchison and Clint W. Murchison, Jr., and Gerard L. Fossland, is granted: This is upon agreement and stipulation entered into by all parties in open court that all depositions, interrogatories and other discovery proceedings heretofore had in this action will continue to have the same force and effect as if Alleghany Corporation had been the original plaintiff in the action at all times.

So much of the motion as seeks to drop Fred M. Kirby as a party defendant has been withdrawn.

So much of the motion as seeks to drop Charles T. Hill, Alfred E. Perlman, William G. Rabe, Joseph M. Fitzsimmons and Anthony Smith as named defendants is granted, it being understood that although these defendants are named in the complaint no service has yet been made upon them.

The caption of the action may be amended to reflect the substitution of Alleghany Corporation as plaintiff.

A pre-trial conference will be held in the chambers of Judge Dawson, Room 2102 United States Courthouse, at 10:30 A.M. on Friday, June 29, 1962, for the purpose of simplifying and defining the issues of the action and in connection therewith passing upon motions to file an amended and supplemental complaint. Plaintiffs are directed to present at that pre-trial conference a short, succinct and enumerated statement of the issues of fact and the issues of law they intend to present in the action.

So ordered.

Dated: New York, N. Y., June 26, 1962.

Archie O. Dawson, U. S. D. J.

[fol. 133]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

JOHN D. MURCHISON and CLINT W. MURCHISON, JR., co-partners, d/b/a Murchison Brothers, and GERARD L. FOSSLAND, as stockholders of Alleghany Corporation on behalf of themselves and all other stockholders similarly situated, Plaintiffs,

vs.

ALLAN P. KIRBY, RANDOLPH PHILLIPS, FRED M. KIRBY, CHARLES T. IRELAND, JR., CHARLES T. HILL, ALFRED E. PERLMAN, WILLIAM G. RABE, JOSEPH M. FITZSIMMONS, ANTHONY SMITH and ALLEGHANY CORPORATION, Defendants.

Before: Hon. Archie O. Dawson, District Judge.

Transcript of Hearing—June 25, 1962

* * * * * * * *

[fol. 135] COLLOQUY BETWEEN COURT AND COUNSEL ON MOTIONS, ETC.

Mr. Donovan: The most important part of the motion, your Honor, and the most disputed is with respect to the third part which is:

> "(b) Granting leave to Alleghany Corporation to file an amended and supplemental complaint herein substantially in the form of the proposed pleading submitted herewith."

As set forth in detail in our moving papers we believe that the proposed amendment and supplemental complaint

[File endorsement omitted]

[fol. 136] serves not only to clarify but to narrow the issues in the case and bring the entire conspiracy into rather sharp focus. We believe that this should conserve the time of the Court as well as counsel since it eliminates many matters, events such as the Murchisons succeeding in the proxy fight have rendered moot and removes that moot material from the complaint.

Furthermore, it accomplishes what the Court has consistently asked be shown and that is exactly how, assuming there is such a conspiracy, how was the corporation damaged here. We, for example, have determined and set forth in detail in our moving papers the reasons for it, that one consequence of the conspiracy was an attempt to immunize Kirby from a self-dealing transaction without Alleghany which occurred—

The Court: That is the 1950 transaction?

Mr. Donovan: Yes.

The Court: Is that the only thing that you are claiming any damages on?

Mr. Donovan: In effect, yes.

The Court: Let me ask you this:

You can't open up the 1950 transaction until you set aside the Anzalone settlement. That is either settled or it isn't settled.

[fol. 137] Mr. Donovan: Your Honor, I think on an analysis of all the papers or the moving papers and the answer, you will find it is asserted that the new pleading would create new issues, open new theories and so on. Actually, this is not so in our judgment. The amended complaint has as its gravamen the precisely same conspiracy, that is late 1959.

The Court: That is preliminary to doing everything. You can't even get to the second cause of action unless you win your first cause of action.

Mr. Donovan: No, your Honor, and what we have simply done is sharpen the implication of the conspiracy at that time and then draw the issue sharply which has not been present as the Court has frequently commented on, the

consequences of the conspiracy. In other words, your Honor, with respect to the fairness of the settlement and whether it is so greatly disproportionate as to be an incentive to commit fraud, this gives specifics and we believe in this manner it clarifies, narrows the issues and does not mean as—.

The Court: Now, are you dropping all the other claims except this one?

Mr. Donovan: In effect, yes.

* * * * * * *

[fol. 138] The Court: You would proceed and show the Anzalone settlement should be set aside, limit yourself to the 1950 transaction?

[fol. 139] Mr. Updike: That would be our proposal. It is my understanding that the Alleghany board of directors has authorized the bringing of that claim and Mr. Donovan's firm has authorized the bringing of that claim and no other.

The Court: If that is all there is to it, are we in effect settling any other claims without giving notice to all the stockholders of Alleghany Corporation? Mr. Murchison could settle without notice to the stockholders of the Alleghany Corporation. It is a round about way of accomplishing that result.

Mr. Updike: It does not seem to me so, if your Honor concludes that Mr. Kirby's settlement was a separate settlement, there are no other parties involved in this transaction.

The Court: I see. Why shouldn't this trial or issue be tried as to whether that Kirby settlement should be set aside which is your first cause of action? Just try that issue and if it is set aside, then, of course, you are over that settlement and go ahead and proceed to establish any damages against Mr. Kirby that you want but it seems to me the first question is this settlement, is it a binding settlement.

[fol. 140] Mr. Updike: It is because it is an oversimplification, sir, to take the view that the first cause of action

involves no element of damages because your Honor has ruled to the contrary. Judge Weinfeld ruled to the contrary in connection with the motion for summary judgment.

The Court: But I wonder if you don't move this case a lot faster if you just try the issue as to whether this settlement should be set aside and, if it is, then you proceed to what damages may be obtained. In setting aside the settlement it is necessary to show that if set aside there would be some damages but you don't have to prove the amount of damages. I tried a case this past year in that a general release and settlement was put in as a defense of the case and we tried the question first as to was the general release binding and found out it was not and then found out what the damages are. I was wondering if that isn't the way to handle this case.

Mr. Updike: Procedurally that is certainly a possible concept and way of walking up to it but it doesn't seem that this problem is involved in this motion before your Honor. It is a problem down the line when we come to a pretrial conference.

[fol. 141] The Court: Well, the question in my mind is whether I should approve filing an amended complaint which completely changes the whole nature of the action. It isn't an amended complaint. It is a whole new action that is being started here.

Now, if this were an amended complaint, merely substituting Alleghany Corporation for Mr. Murchison and bringing a suit to set aside Mr. Kirby's settlement, I could see that; I see there is reason or logic in it; but then when you add on to that several other causes of action which don't exist specifically in the other complaint, then you have a problem. You are starting an entirely new cause of action under the guise of amending the complaint.

Mr. Updike: I respectfully disagree with your Honor, and I reiterate that your Honor has already ruled more than a year ago that we were entitled to go into the facts with respect to this 1958 exchange transaction, which is an

indication to me that this was part of the present complaint, and so that the proposed amended complaint is not a new cause of action.

The Court: Then why do you need to amend the com-[fol. 142] plaint? Why don't you simply substitute Alleghany Corporation for the Murchisons in the complaint and go ahead on the present complaint?

Mr. Updike: It is because in the present complaint we specify and particularize with respect to the area in which we believe Alleghany Corporation was mulcted by Mr. Kirby.

The Court: And you say that is the only one.

Mr. Updike: Yes. And the several counts merely relate to different statutory bases which we believe will support that claim.

The Court: Well, I am wondering if instead of simplifying it you are simply complicating the matter. That problem bothers me. If you simply did what comes naturally, you just put Alleghany Corporation in, in place of the Murchisons, as the plaintiff, and then you proceed to trial fairly promptly on this issue of whether the settlement with Mr. Kirby should be set aside, and if it is decided to set it aside, then you go on and prove what the damages are.

Now, of course, you have got to; in setting it aside, prove the amount that he settled for was inadequate. Therefore [fol. 143] you have got to get into some of the question of what his liability might be, I think that is true, but you do not have to prove the amount of damages when you set the settlement aside. That is largely a question as to whether or not there was this corrupt understanding for the settlement.

Now, I am a little worried about amending a complaint to set up new causes of action which are really a new lawsuit. I am not worried about substituting Alleghany Corporation or going ahead on the present complaint with Alleghany Corporation as the plaintiff.

Mr. Updike: If I understand the New York cases with respect to this problem—and I believe I do—the proof of the inadequacy of the settlement, the proof of the underlying cause of action and its validity is part of our Count 1, even as it is presently constituted.

The Court: Then why do you need Count 2?

Mr. Updike: Well, it is because in the first place our present Count 1 related only to an attempt to achieve the difference between a reasonable sum in settlement on the one hand and what Alleghany itself actually received from the settlement. The present complaint expands that to in-
[fol. 144] clude an action for true rescission.

The Court: Which you say is a part of your first cause of action anyway.

Mr. Updike: Well, in the sense of notice pleading, yes, it is there, but under the New York statute we may put in relief in the alternative which on its face may look inconsistent, and it is perfectly permissible to do so. But the instant pleading puts these defendants on notice—and does no more than this, I submit—of the particulars with respect to which we claim or Alleghany claims it was mulcted by the defendant Kirby. It sets forth the specific theories upon which such relief should be granted, and these are, in my judgment, an integral part of Count 1.

Now, if, as a matter of the procedure within this court, over which it obviously has control, your Honor were to rule that you will first hear the portion of the case which relates to the fraud as we claim culminating in the separate Kirby settlement in December of 1959, that, of course, can be the Court's approach to the problem, but it does not seem to me, sir, that this is a problem before you this morning.

The Court: Well, maybe not. How soon would the plain-
[fol. 145] tiffs be ready to proceed on that first problem? What more do you need?

Mr. Updike: Excuse me, may I have that again?

The Court: How soon would you be ready to proceed to trial on that first issue?

Mr. Updike: I do not anticipate that under this amended complaint the trial will take place any later than it would under the existing complaint.

The Court: How soon do you think the plaintiffs will be ready for trial?

Mr. Updike: Well, it is my concept that the plaintiffs will be ready for trial in October or November of this year. The facts set forth in Count 2 are very largely documentary. Some depositions will have to take place with respect to them in order to support the documentary basis.

The Court: That is one thing that bothers me. Why do you need to go ahead on Count 2? Why can't you go ahead on Count 1 and get the right to bring the lawsuit first, and then go ahead on Count 2, to prove your damages?

* * * * * * *

[fol. 146] Mr. McDonald: That leaves, then, only the third part, your Honor, and on that I should like to turn to what I proposed to say upside down, by taking what I had worked out in my own mind yesterday afternoon as the procedure which I thought this Court might consider in dealing with this, state my conclusion, and then give your Honor my supporting thinking.

It seemed to me, as I tried to think through this situation, that your Honor might conceivably be moved to allow Alleghany to take over the present lawsuit and file a simple amended complaint which, in effect, would plead Count 1 as it is in the present lawsuit, based upon the claim that there was a 1959 fraud; that thereafter your Honor, after that was tried, would then consider what would be appropriate for the Court to do.

I am confident, and I think all defendants share this confidence, that when that issue of a claimed 1959 agreement is tried before your Honor the case will be over.

But let us assume the far-fetched hypothesis that we [fol. 147] lose. Then it would seem to me that your Honor would seriously consider whether it would not be appropriate to remit Alleghany to the State Court for such proceedings as would be appropriate to seek a review of

claimed errors of fact and law in connection with the Zenn settlement.

Now, the reasons underlying that conclusion—and I did not get to it quickly—have largely been anticipated in the colloquy this morning. We have a completely different lawsuit proposed.

Let us first look at the lawsuit we have been preparing for for 18 months. We have a clearcut issue, susceptible of an early and prompt trial. That issue is this, and this is the only issue in the present lawsuit, assuming they are no longer pressing that second count:

In October, November and December 1959 was an arrangement between the three defendants—I suppose if we are keeping Mr. Kirby in, Fred Kirby, the four defendants—I suppose if we are keeping Mr. Kirby in, Fred Kirby, the four defendants—which on the facts and the law would give Alleghany a right to challenge the binding effect of the settlement of the State Court case of Zenn v. Anzalone, [fol. 148] and also to challenge the lifting by Judge Dimock of the injunction that Judge Walsh had given in the Breswick case?

Now, there is no question of fact in that lawsuit on the issue of the claimed agreement prior to September 22, 1959. Your Honor is familiar with that date. It is Judge Dimock's date of decision. It involves a narrow period of time. At the most it involves a period from October through March, October '59 through March '60. It involves a relatively small number of witnesses, the parties, Mr. Eppler, who is supposed to be the star witness, Mr. Daly and Mr. Graubard, as lawyers who are involved, perhaps Mr. Wallace.

Now, contrast to what is proposed when you add five counts. Count 1 starts off in the proposed complaint as a misjoinder, both of causes and of parties, I respectfully submit. It is admitted by Mr. Updike and admitted in the papers it poses as one cause of action the claim of the 1959 alleged agreement, but it intermingles therewith a completely different cause of action. That cause of action

—and we haven't had much time to try to analyze these evidentiary papers, but it seems to assert some theory [fol. 149] based upon events in 1949, '50, '55, '56 and '59, and I gathered the rather startling impression in the colloquy earlier this morning that Mr. Donovan himself had not recommended that part of this lawsuit. If I am wrong perhaps he would clarify what his recommendation was, but I thought he said to your Honor that he recommended the simple thing of taking over the present lawsuit, and that it was for that reason he was referring to Mr. Updike to try to defend the broadening of it.

If that is wrong, Mr. Donovan, you will have due time to correct me, but let me make my point.

Now, on the second cause of action which is mixed in this proposed count, there is no claim whatsoever against Mr. Phillips, and your Honor has put his finger right on it, and I do not have to elaborate, because the Breswick case never included the 1950 transaction.

Counts 2 to 5 are against Mr. Kirby only, so there is no proper joinder of Mr. Phillips, and I am finding difficulty in conceiving how there is any proper joinder under any theory of Mr. Ireland, but Mr. Kissam will probably have something to say as to that.

The Court: I do not understand what is the relief sought [fol. 150] against Mr. Phillips on the first cause of action.

Mr. McDonald: It is not very clear, but I gather they want some accounting of some sort for maybe what he got under his service to Alleghany and to IDS after April of 1959. I think that is the most—

Mr. Phillips: April 1960.

Mr. McDonald: April 1960, yes.

The Court: If that is so, that is a separate cause of action where there is no diversity of citizenship.

Mr. McDonald: Yes, and that is the second count in the present complaint.

Count 6 is kind of like the Bollenbak intervention, which you rejected once before. Bollenbak wanted to bring in proxy expenses. Count 6 wants to bring in attorneys fees and there simply isn't any basis for that in the background of this case.

What is the prejudice that we urge, your Honor, is upon the defendants? First, there is a prejudice of delay. Obviously we are going to have to start discovery over.

The Court: I do not understand why you have to start [fol. 151] discovery over.

Mr. McDonald: Because we have not undertaken any discovery whatsoever, your Honor, with respect to the claim which is now asserted as a part of the intermingled second cause of action in Count 1, that information which was available to Mr. Kirby was withheld in the Zenn hearings, and that that is a cause of action to set aside the settlement as to him.

I think I missed making that clear to your Honor. As we read the papers, the proposed Count 1 asserts two causes of action as theories for attacking Mr. Kirby:

First, that he was in this, what they call, fraudulent agreement in the fall of 1959;

Secondly, that he fraudulently withheld information, not information they say he knew, but information which in some obscure way was available to him in the Zenn hearings.

Now, on that second point about what was available and where it was available and who had it and what was produced, we have not yet started any discovery, so that we shall have to conduct discovery in many avenues; we shall have to have a long set of interrogatories as to what docu- [fol. 152] ments they are referring to, where those documents were, and how they became available to Mr. Kirby, et cetera.

And all of that evidence at this point—it may change with another proxy fight, but at this point every bit of the evidence which we will need, if this broadened second count and later counts are put in here, must come from sources that are under Alleghany's control, either from their own files or from IDS' files, and it poses a whole new complex of legal problems which we haven't even tried to research or even to formulate.

Now, finally—and I am almost through—let me suggest to your Honor what the logic is, aside from anything else,

that supports our proposed disposition, and your Honor has already started from the same point.

What was Judge Dimock concerned with? No matter how many times people stand up in this court—and it has been done in your Honor's presence since the beginning of this case—and say to you that Judge Dimock approved the settlement, it is not true, for the simple reason of Rule 23.

Judge Dimock casually, in colloquy from the bench, said, "I approve of this." He approved of the procedure which [fol. 153] had gone through, but his order merely lifted an injunction. That injunctive order in Breswick v. Briggs prevented or would have prevented any of these defendants in the Zenn case from pleading as res judicata a decision on the settlement in Zenn. But since that injunctive order did not apply to the 1950 transaction, the 1950 transaction was never before Judge Dimock. If the Breswick order were restored, if your Honor says now this proceeding in 1959 was all wrong, and if your Honor restored everything that was in that Breswick order, the binding effect of the releases in the State Court of the 1950 transaction would not be affected.

The Court: Let me ask you this, Mr. McDonald:

What authority have I got to set aside a settlement in the State Court anyway?

Mr. McDonald: That is my next point, your Honor. That is my next point, and I went over the referee's report today, this morning, on this cause of action.

The referee considered, and I can read this, but I do not want to take your Honor's time to do it, he considered every contingent that is made in the second to sixth causes of action, and he rejected them.

[fol. 154] The Court: Well, here is the problem that bothers me. In order for the plaintiffs to get anywhere in this case they have got to set aside a settlement, which settlement, as I understand, was primarily a settlement in the State Court, and if there is a fraud on anybody it was a fraud on the State Court.

Now, why should the time of this Court be taken up with a fraud which, if anywhere, was a fraud in the State Court?

Mr. McDonald: That is precisely correct, your Honor, and in that connection yesterday afternoon I tried to sit down and think of some of the questions that this Court would be confronted with in view of the fact that what we are dealing with here is a settlement of Zenn in the State Court.

Were the documents involved in this new complaint in the files of Alleghany? If so, they were admittedly under the control of Mr. Young and Mr. Wallace.

Did Mr. Pomerantz see them?

The testimony in Zenn says that before he negotiated the settlement he and his associates, Mr. Haudek and his associates and his accountants saw thousands of documents [fol. 155] in Alleghany's files.

Don't hold me strictly to thousands, because I hadn't had time to check that testimony, but he says, "We spent days going over all the documents."

Did the general counsel for the plaintiffs correctly appraise those documents? If they were not in the Alleghany files, where were they? Were they under the control of the Murchisons who were then in the control of IDS? Did the Murchisons suppress them at IDS in order to obtain approval of a settlement which Alleghany now does not want to relitigate?

What documents were produced for Graubard?

The record in the Zenn referee hearing will show that the referee ordered Alleghany to show Graubard all these documents.

The evidence will show that Mr. Graubard and his associates and Mr. Brussell spent some time in a large room at Alleghany looking at many documents, none of which have been inventoried.

* * * * * * *

[fol. 156] (Recess.)

Mr. Meyer: Your Honor, before you leave the bench, may I be heard on one point of confusion concerning these papers this morning? This is in Murchison v. Kirby.

The Court: I will reserve decision on that.

Mr. Meyer: May we submit the reply memorandum?

The Court: On law? I will take a reply memorandum of law from either side; no more affidavits.

Mr. Meyer: Tomorrow morning.

[fol. 157]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

vs.

ALLAN P. KIRBY, RANDOLPH PHILLIPS, FRED M. KIRBY, CHARLES T. IRELAND, JR., Defendants.

Before: Hon. Archie O. Dawson, District Judge.

Transcript of Hearing—June 29, 1962

* * * * * * *

[fol. 158]

COLLOQUY BETWEEN COURT AND COUNSEL RE CAUSES OF ACTION

The Court: Now, I may be wrong. You people know so much more about this than I do, but as I visualize this situation, you have here, in essence, a suit which is two-fold; one, to set aside a settlement in the Zenn-Anzalone

cases, and then, if that is satisfied, to recover on behalf of Alleghany Corporation for certain damages which were claimed in Zenn v. Anzalone.

Now, the first problem, it seems to me, is this:

Don't you have to try, first, whether this settlement can be set aside, and isn't that the primary issue in the case, because if that settlement is a good settlement and the releases given were good releases then you haven't got any cause of action at all. If you can set it aside then, of course, the extent of the claim that you may make depends upon Zenn against Anzalone, as I understand it.

If you want to add some more causes of action to it, I would like to know what they are, that weren't in Zenn against Anzalone, but why can't you handle this case by a straight suit to set aside that settlement on the ground of the so-called corrupt conspiracy entered into between Mr. [fol. 159] Kirby and Mr. Phillips and Mr. Ireland and segregate that issue for trial, try that issue, and then if that is decided in your favor, go on without any limitation of any settlement at all.

Now, as I understand it, it is now proposed that in setting aside the settlement you are going to rely primarily upon the so-called 1950 transaction. It doesn't seem to me that that requires a separate cause of action. If you set aside Zenn against Anzalone—and that 1950 transaction is in Zenn against Anzalone—then, of course, you can go on and try the 1950 transaction. But, instead of having two causes of action you have one lawsuit to set aside the settlement. If you set aside the settlement then you go on and try what the liability is on the 1950 transaction.

. . . . . .

[fol. 160] The Court: Let me ask you this:

Why couldn't you proceed on your present complaint, Count 1 of your present complaint and simply stipulate as part of a pretrial order that the only issue to be opened if the Zenn-Anzalone settlement is set aside is the 1950

[fol. 161] exchange transaction and that is an issue upon which you rely to show the inadequacy of the settlement.

Mr. Updike: Well, that could be done. There is one aspect of it that I would like to bring to your attention. It is our view that on proof of the facts with respect to the 1950 exchange transaction and specifically on proof of the facts with respect to what was adduced in the court before Referee Fitzsimmons in connection with his trial of those issues and his report on those issues, there will arise a basis for claiming that quite independently of his arrangements with Mr. Phillips as we allege and have alleged them, he was under a duty as the chairman, the chief executive officer and controlling shareholder of Alleghany to come forward and state to the Court the facts that would enable the Court to decide whether this settlement was fair to Alleghany.

• • • • • • •

[fol. 162] The Court: Let me ask you this, Mr. Carter:

What you say about amendments being freely granted is true, but also the Judicial Conference says that at a certain time in the proceeding the judge should have a pretrial conference to try to define the issues, and the pretrial order supersedes the pleadings.

What I am trying to do now is to see if we cannot define exactly what the issues are so we all understand them and get away from the technical forms of pleading.

Mr. Carter: Judge, I think that is a step—

Mr. McDonald: Wouldn't it be helpful if you heard from the defendants?

The Court: I just want to ask Mr. Carter this question, because I am a little puzzled about the issue in this case.

Is your issue that the settlement should be set aside because Mr. Phillips got a side deal on it, or is it the settlement should be set aside irrespective of that because of the fact that it was an inadequate settlement of this 1950 transaction?

Mr. Carter: Well, I would say it is a combination of both. You cannot restate them in quite that way. What

[fol. 163] we are saying, in effect, is, that after Judge Dimock came down with his important decision on September 22, 1959, Phillips and Ireland got together, after they knew that Mr. Kirby was fearful of the result to his own personal fortune by having a de novo situation here, and then from that point on this conspiracy started with a view to allowing Mr. Kirby to settle his own individual liability as distinct from his co-defendants' at terms much more favorable than he otherwise would have received, in return for a position of substance and prominence for Mr. Phillips, which we claim was done.

The Court: Now, suppose there wasn't any such deal with Mr. Phillips? Wouldn't you still have a cause of action against Mr. Kirby, I mean settlement of an inadequate sum?

Mr. Carter: Oh, yes, both ways.

The Court: Now, therefore, you really have two causes of action there, it seems to me. One is that the settlement should be set aside because of the deal with Mr. Phillips. The other that irrespective of that, whether there was any deal with Mr. Phillips or not, that the settlement should be set aside because Mr. Kirby failed to perform his fiduciary duties to the stockholders.

[fol. 164] Aren't those the two causes of action that you have?

Mr. Carter: Yes.

* * * * * * *

[fol. 165] The Court: Well, I see you have in your statement of the issues separated them along the line that I said; first, that the 1950 transaction is a voidable transaction anyway, irrespective of any deal with Mr. Phillips, and apart from that, the deal with Mr. Phillips makes it voidable.

Mr. Carter: I think you will find these very helpful, Judge.

The Court: All right, Mr. McDonald.

Mr. McDonald: Well, I think we would like to bring this

situation into some focus, your Honor, from the defendants' standpoint.

As you have pointed out, we have been defending a lawsuit now for nearly two years which was a very clear lawsuit. My client's expenses for the Master and the depositions alone are in excess of $35,000. This lawsuit is a very simple lawsuit. It was a contention that Mr. Phillips and [fol. 166] Mr. Kirby and Mr. Ireland made some sort of an agreement. We have asked each witness who would have any knowledge of the facts, Mr. Adams, Mr. Murchison, Mr. Fossland, both Mr. Murchisons, if there was any claim of any misconduct prior to September 22, 1959. They have unanimously answered there is no such claim.

We have asked each one of them if they had any claim of any evidence additional to what was before the Referee in the State Court. They have unanimously answered they had no such claim.

A large part of the depositions has been devoted to the second count which these gentlemen must have known was moot a year ago, and which could have been dropped out if they had taken this position promptly.

Now, we have a disagreement between Mr. Updike and Mr. Carter in answer to your Honor's questions. Mr. Carter says there is no new cause of action. Mr. Updike says that even if there was no agreement with Mr. Phillips, we still have a theory on which we could set aside this judgment, and on your Honor's further questioning it now comes out that is a second cause of action, and it is a new [fol. 167] cause of action. It has never been in this case before.

Now, the surprise to us comes in this new claim that back in 1950 there was some concealment which was not before the Court. The surprise comes to us also in the sense of what they are trying in this new claim to assert.

What they asserted in the original complaint, which is now before your Honor, is that—in paragraph 45—

> "That Mr. Kirby knew or had reason to know that by means of the fraudulent separate settlement (this

> is the alleged agreement with Mr. Phillips) he was obtaining a release of his liabilities to Alleghany at an amount far less than that which he would have had to pay had the fraudulent action described in the preceding paragraphs not been committed."

In other words—and this is an interesting development —we have always asserted that the issue—and your Honor has tended to agree with us—the issue on that claim is, what was a fair and reasonable settlement? And Mr. Updike has always said, "We don't have to prove that the settlement was inadequate."

That is in your records earlier.

[fol. 168] But at any rate, the issue was—posed by this complaint—what is a fair and reasonable settlement, and was this settlement less than Mr. Kirby would have had to pay in settlement if this alleged fraudulent agreement had not existed?

Now, instead of that, they want to substitute a new cause of action which attempts to assert a liability for a tremendous sum of money, all of which was before the Court in Zenn v. Anzalone.

Now, we are going to have to start our discovery all over if that new cause of action comes in. It is our position, in short—and I won't take near as much time as the plaintiffs have—it is our position, in short, that if there was no agreement between Mr. Kirby and Mr. Phillips, this lawsuit is over because the only thing that was before the Federal Court, and that the Federal Court was involved in, was the question of whether or not Judge Walsh's injunction should be lifted, and we think that a separate trial can be had and should be had upon this basic issue first.

Now, Mr. Updike has mentioned some Appellate Division cases, about trying cases as a whole. We are operating under the Federal Rules of Civil Procedure which specifi-

[fol. 169] cally provide for a separate trial of issues.

We think the issue which should be tried separately and

first in the interests of justice to everybody is this—and we have no pride of authorship, but this is the essence of it:

During October, November and December 1959—there are two of them here—did Phillips have substantial dominance and control over Breswick versus Briggs and over one or more of the objecting stockholders in Zenn versus Anzalone?

That is based on Paragraph 28 of the complaint.

Mr. Phillips: May I interrupt, Mr. McDonald? That is also specified as issue No. 5 in statement of issues of fact of the plaintiffs.

The Court: Go ahead.

Mr. McDonald: Yes. And issue No. 2:

Did Kirby and Phillips agree that in return for Phillips' advocacy of the settlement made in December 1959 Kirby would provide Phillips with personal benefits?

Now, if those two questions, if either of those questions is answered "No," and certainly if both of them are an- [fol. 170] swered "No," it is our submission, respectfully, that this case is over.

Now, let us look at what the State Court had before it. In July of 1955 Alleghany made a motion for the approval of this settlement. Mr. Young was the chief executive, not Mr. Kirby. The Murchison lawyers and the Young lawyers represented to the Court that Mr. Kirby had no part in this whole thing. A referee was appointed. The 1950 transaction was exhaustively gone into.

I am now in the process of annotating this proposed complaint against the exhibits in the Referee's hearing. Mr. Pomerantz was given access to all the documents in Alleghany. Mr. Graubard was given that access. And all of these facts were before the Referee.

Now, if the contention is, in this new cause of action, that there was some duty on Mr. Kirby in connection with the Referee's hearings which he did fail to perform, that was a fraud solely, if it was a fraud at all, that was a fraud solely on the State Court in the Referee's hearings.

The only thing that this Court was concerned with was

the case of Breswick versus Briggs, and the 1950 trans-
[fol. 171] action was not in it at all.

* * * * * * *

[fol. 172] The Court: Well, let me ask you this—this is to everybody:

Now, if the first cause of action, as it presently stands, is not sustained, in other words, the Zenn-Anzalone settlement is not set aside, then I take it that the Alleghany Corporation could not bring this claim against Mr. Kirby in any case, could they? I mean the settlement has been entered, and on the 1950 transaction; therefore the prerequisite bringing the second cause of action is to set aside the settlement with Mr. Kirby in the Zenn case, is it not?
[fol. 173] Mr. McDonald: That is correct, your Honor.

Mr. Updike: And that is why there are not two different causes of action here so much as there are two different theories of liability with respect to the same facts.

Mr. Kissam: This is a new theory.

The Court: Let me ask you this, Mr. Updike. If you don't set aside that settlement, even though there is a separate theory on it, you couldn't sue Mr. Kirby anyway, could you, on that 1950 transaction?

Mr. Updike: No, unless the settlement is set aside, on one theory or the other, we have no claim against Mr. Kirby.

The Court: No claim against Mr. Kirby.

Mr. Updike: That is correct.

The Court: The first thing you have to do is set aside the settlement.

Mr. Updike: Yes, sir.

* * * * * * * *

[fol. 174] The Court: Let me ask you this: I am trying to keep this on the track if I can. If this settlement is not set aside then the 1950 transaction can't get in at all, can it? Even if you have the second cause of action and the 1950 transaction, the settlement against Anzalone would be a complete defense, would it not?

Mr. Updike: Unless on proof of those facts, the total [fol. 175] facts, your Honor either concludes that the settlement must be set aside by reason of the corrupt agreement or that it should be set aside by reason of Kirby's failure to discharge his fiduciary duties.

The Court: Why can't you accomplish what you want there by amending your first cause of action to allege alternatively to the corrupt agreement the other allegations that Mr. Kirby failed to reveal certain things when he should have done so and the Referee was misled? Put that all in the first cause of action and try the issues as to whether the settlement should be set aside.

Mr. Carter: That is all right.

The Court: On any of those theories.

Mr. Updike: We could amend the complaint in that way but in amending it in that way we would have to allege the fact basis giving rise to the breach of Kirby's fiduciary duties with respect to the 1950 transaction.

The Court: There is one action then, an action to set aside the settlement of Zenn-Anzalone. If that is set aside, as Mr. Carter says, what the damages there might be could be the subject of a separate hearing but you get down to one action which is to set aside the Zenn-Anzalone settle- [fol. 176] ment on one of two bases, either there is a corrupt agreement with Mr. Phillips or Mr. Kirby failed in his fiduciary obligations. Isn't that in essence really what you want to establish?

Mr. Kissam: May I ask a question?

Mr. Updike and his associates haven't given one single case to support the right to base such an action on a breach of fiduciary duty.

The Court: You don't need to now. That is merely an amendment of the pleading.

Mr. Kissam: You are not inviting motions I assume.

The Court: If there isn't any such cause of action that could be raised when the pleading is amended but it seems to me if we keep our eye on the ball, this case can't go anywhere unless you set aside Zenn-Anzalone. You can set it

aside on one of two theories, Mr. Phillips' corrupt agreement or Mr. Kirby's failure in his fiduciary duties, irrespective of Mr. Phillips entirely. If you do that you have got a cause of action to set aside the settlement and then for the relief which would follow, if you set it aside, I suppose then you can go ahead on Zenn-Anzalone.

* * * * * * *

[fol. 177] The Court: I think Mr. Carter's suggestion was a good one, if the issue as to whether or not the settle-
[fol. 178] ment should be set aside is decided, then you can have a separate hearing on what relief would follow. For example, if the settlement was set aside on the grounds of some corrupt agreement with Mr. Phillips, maybe Mr. Phillips has to account for what he got. If it is set aside because of what Mr. Kirby did, then Mr. Phillips is out. But it seems to me that is an entirely different trial that we have at that time.

* * * * * * *

[fol. 179] The Court: But we can try the whole thing as one cause of action here, and I think plaintiff has the right to change his theory on his cause of action, under the decisions that have come down. All we are saying here is that the present first cause of action which will be tried, will be tried either on the theory of the corrupt agreement or on the theory that Mr. Kirby violated his fiduciary obligations. And, as I understand it, it will be limited to the 1950 transaction, so far as that is concerned.

Mr. Updike: That is correct, your Honor. And we are
[fol. 180] not so much changing a theory as we are adding an additional theory.

The Court: Yes.

Mr. Kissam: When your Honor said it will be limited to the 1950 transaction, I would like to inquire by virtue of what authority would it be limited, under the language of the present first cause of action which relates to all causes of action in this end complaint? There are eight causes of action.

The Court: That is a good point.

What do you say to that? If we set aside the settlement is the whole settlement open? I suppose it is.

Mr. Updike: The answer is, on the recommendation of Alleghany's counsel and on our own recommendation, this is a transaction on which we believe—

The Court: You are going to rely.

Mr. Kissam: —Alleghany has the best chance to succeed, and it is warranted in so doing.

Now, there has been mention of the other Zenn causes of action, and as Mr. Phillips pointed out there is a cause of action in this court, Zenn Federal, identified in the pleadings here, and if somebody in connection with that suit wants to sue the Murchisons or anybody else, it is there [fol. 181] and available. But for purposes of this litigation we are under authority and instruction to assert the 1950 exchange transaction.

The Court: But from the standpoint of the proceedings in the court, why shouldn't this be a suit to set aside the settlement in Zenn-Anzalone? That is all it is. Then if the Zenn-Anzalone is set aside, it opens up the Zenn-Anzalone settlement, and then Mr. Carter can go ahead and say you are entitled to so much more money on the 1950 transaction, and if Mr. Palmer or any of Mr. Phillips' friends want to come in and pursue some of the others, why, they can, I take it.

Mr. Updike: As I pointed out a minute ago, Alleghany would have the option to affirm the settlement and merely prove the damages for the fraud if it can demonstrate that the settlement was inadequate.

The Court: In other words, you would restrict your proof of damages to the 1950 transaction.

Mr. Kissam: Your Honor, does that mean that paragraph 40 of the present complaint will be withdrawn?

Mr. Carter: I don't know.

Mr. Kissam: Paragraph 40 of the present complaint [fol. 182] raises every single one of the eight causes of action in the Zenn case.

Your Honor, in order to say we will test this by the 1950 cause of action, that is like saying if a man has eight barns we will value one and we will forget the other seven. They may like to forget the other seven, but we won't let them.

The Court: You don't have to. If the Zenn settlement is set aside, then the Zenn settlement is set aside, and all hell can break loose over the lot.

Mr. Kissam: Yes, but in setting the Zenn settlement aside, it is going to break loose right in this lawsuit.

The Court: I don't think it is, if I have anything to do with it.

Mr. Phillips: Your Honor, don't you think there is a question of prejudice to me though involved in this 1950 cause of action? Here the plaintiffs have conceded that the 1950 cause of action does not lie against me.

The Court: It isn't the cause of action any more. It is not going to be. It is going to be something in the first cause of action.

Mr. Phillips: However you described the facts if they [fol. 183] now wish to plead into the first cause of action, as I understand it, it is to delay the trial of the action on the conspiracy count, so-called "corrupt agreement," until after there has been further discovery on the 1950 cause of action, which delays me, delays all my associates. They know very well that we cannot make a fee application in the State Court until the conspiracy count is over.

This thing has gone on now for three years almost, and will go on for a fourth year, and it will involve me in delay by standing by, listening to testimony that doesn't affect me in any way. It is not charged against me on the 1950 cause of action.

The Court: I know. But if that settlement is set aside, whether it is set aside because of what you did or because of what Mr. Kirby did, you are still not going to get your fees from Judge McGivern. I mean, if the settlement is set aside, it is set aside.

Mr. Phillips: Excuse me, sir. As I understand this, the application to Mr. Justice McGivern is being held up only

because there has been allegation of fraud in the settlement. Now, if there is not an allegation of fraud, in so far as our side of the case, by that I mean Mr. Graubard, [fol. 184] Mr. Brussel and myself side of the case is concerned, there is no bar to our making application for a fee.

The Court: No bar, but I can't imagine Judge McGivern giving the fee if the whole settlement is subject.

Mr. Phillips: The whole settlement isn't subject.

The Court: The whole settlement will be subject, because if they set aside the settlement on the basis of Mr. Kirby violated his duties, the settlement is set aside, and there is no settlement and there is nothing for you to get fees out of.

Mr. Phillips: No settlement as to him, as to his contribution.

The Court: That ends the whole settlement.

Mr. McDonald: The whole settlement goes, because if the 1950 transaction is open, everything is open.

Mr. Phillips: Yes, but it seems to me, your Honor, if the so-called "corrupt agreement" is found not to have been made, the releases that had been executed are a complete bar to the second, to the new cause of action.

The Court: No, it is more than your "corrupt agree-[fol. 185] ment," so-called. It is a question of whether the settlement is a valid settlement. If it isn't a valid settlement, either because you did something wrong or Mr. Kirby did something wrong, there is no settlement; there are no releases.

* * * * * * *

[fol. 186]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR., and FRED M. KIRBY, Defendants.

NOTICE OF MOTION—Filed November 27, 1962

SIRS:

Please Take Notice that upon the annexed affidavit of Stuart N. Updike, sworn to November 20, 1962, the order made herein by the Honorable Archie O. Dawson on June 29, 1962, and upon the proposed Amended and Supplemental Complaint annexed hereto, plaintiff Alleghany Corporation will apply to the Honorable Archie O. Dawson, in Chambers, Room 2102, United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, at 4:30 o'clock in the afternoon of the 30th day of November, 1962, or as soon thereafter as counsel may be heard for an order pursuant to Federal Rule 15 granting Alleghany Corporation leave to file and serve an Amended and Supplemental Complaint in the form submitted herewith.

Dated: New York, New York, November 20, 1962.

Yours, etc.,

Townley, Updike, Carter & Rodgers, By Stuart N. Updike, A Member of the Firm, Attorneys for Alleghany Corporation, 220 East 42nd Street, New York 17, New York.

[fol. 187] To:

Donovan Leisure Newton & Irvine, Attorneys for Allan P. Kirby and Fred M. Kirby, 2 Wall Street, New York 5, New York.

Kissam & Halpin, Attorneys for Charles T. Ireland, Jr., 120 Broadway, New York 5, New York.

Randolph Phillips, Pro Se, 128 East 70th Street, New York 21, New York.

[File endorsement omitted]

[fol. 188] ATTACHMENT TO NOTICE OF MOTION

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

[Title omitted]

AFFIDAVIT OF STUART N. UPDIKE

Stuart N. Updike, being duly sworn, says:

1. I am an attorney admitted to practice in this Court and in the Courts of the State of New York, and I am a member of the firm of Townley, Updike, Carter & Rodgers, attorneys for plaintiff herein. I have participated in this litigation since its inception and am generally familiar with the proceedings since then.

2. I make this affidavit in support of the renewal, following the order of this Court dated June 29, 1962, of an application by Alleghany Corporation pursuant to Federal Rule 15 for an order granting leave to serve and file an amended and supplemental complaint in the form annexed to the present notice of motion.

Background of This Application

3. By notice of motion dated and served June 13, 1962, and heard June 25, 1962, Alleghany Corporation sought leave (a) to prosecute this action and be substituted as plaintiff; (b) to drop certain defendants; (c) to amend the [fol. 189] caption of the action; and (d) to file an amended and supplemental complaint in the form submitted with the moving papers.

4. By endorsement dated June 26, 1962, this Court authorized Alleghany to be substituted as plaintiff; authorized the dropping of parties other than Allan P. Kirby, Charles T. Ireland, Jr., Randolph Phillips and Fred M. Kirby; authorized amending the caption to reflect the foregoing relief; continued with the same force and effect the discovery proceedings theretofore had; scheduled a pretrial conference for June 29, 1962; and directed Alleghany to present short and succinct statements of the issues of law and fact at such conference.

5. On June 29, 1962, Alleghany presented the required statements of issues of law and fact, and an extended pretrial conference was held with respect to the then proposed amended and supplemental complaint.

6. During the course of the pretrial conference on June 29, 1962, the court, while agreeing in principle with Alleghany's proposed Amended and Supplemental Complaint insofar as it sought to plead a "corrupt agreement" and "violation of fiduciary obligations" as bases for setting aside Kirby's 1959 settlement, rejected the form of that proposed complaint upon the ground that it should instead be pleaded as one claim for relief. Thus, the court stated (transcript p. 44):

> "The Court: Why can't you accomplish what you want there by amending your first cause of action to allege alternatively to the corrupt agreement the other allegations that Mr. Kirby failed to reveal certain

things when he should have done so and the Referee was misled? Put that all in the first cause of action and try the issues as to whether the settlement should be set aside."

[fol. 190] And (transcript p. 58):

"The Court: * * * All we are saying here is that the present first cause of action which will be tried, will be tried either on the theory of the corrupt agreement or on the theory that Mr. Kirby violated his fiduciary obligations. And, as I understand it, it will be limited to the 1950 transaction, so far as that is concerned."

And again (transcript p. 64):

"[I]t seems to me that we can keep this case on the tracks by making this a case to set aside the Zenn-Anzalone settlement on any theory that the plaintiffs can adopt to set aside that settlement."

7. Consequently, the court ruled that the proposed complaint should be redrafted as one cause of action to set aside the 1959 settlement (transcript pp. 69-72):

"The Court: But to set up that theory and set up as you have now the theory that Mr. Phillips is the corrupt individual in this picture, why, you have got both theories, you go ahead and the issue before the Court is should the Zenn-Anzalone settlement be set aside?

* * *

"Mr. Kissam: Your Honor is not directing that it be a separate count.

"The Court: I don't think it should be a separate count. If I do that I would run afoul of what Judge Clark has been saying.

* * *

"[The Court:] But I am going to allow an amendment of the type I have suggested. * * * I am not going to allow the amendment as it is presently stated."

The Present Application

8. In consequence of the foregoing observations and ruling by this Court, my firm has redrafted the proposed complaint and submits a copy on this renewal of the previous [fol. 191] motion under Federal Rule 15. In keeping with the suggestions of the court, the proposed pleading contains only one basic claim, namely, to set aside the 1959 Kirby settlement upon the ground either of the corrupt agreement between Mr. Kirby and Mr. Phillips or Mr. Kirby's violations of fiduciary duty.

9. The proposed pleading has been very substantially shortened as recommended by the court. Since this is a protracted case, however, we have pleaded certain facts with particularity in an effort to simplify future pretrial discovery.

10. As I noted in my affidavit dated June 12, 1962, in support of the prior motion to amend this complaint, there would be no prejudice to the defendants if this motion is granted. Pursuant to rulings made by this Court on April 18, 1961 (pp. 34, 39), Mr. Kirby already has been interrogated with respect to the facts of the 1950 Exchange Transaction pleaded in the proposed complaint. I do not believe that additional oral examination will be required of him by Alleghany. Moreover, neither Ireland nor Phillips was an officer or employee of Alleghany at the time of the 1950 Exchange Transaction. Hence, no further deposition testimony in that regard need be sought from them.

11. Undoubtedly, Alleghany will wish to take the depositions of certain persons connected with the 1950 Exchange Transaction. Defendant Kirby probably will also seek to take certain depositions in that connection. These depositions, however, were necessary under the original complaint

and would have been taken in any event to establish the unfairness of the separate Kirby settlement in keeping with [fol. 192] the allegations of that complaint. The number and length of such depositions will in all events be far less than the number and length of depositions which are eliminated by the proposed complaint.

12. None of the pretrial proceedings to date is affected to any substantial degree by the amended pleading. Moreover, defendants have noticed approximately twenty depositions arising from the allegations in Count II of the present complaint to be taken in various parts of the country. Those depositions, of course, will become unnecessary under the proposed complaint. An appropriate motion to vacate those notices of deposition will be made, if necessary, in the event the present motion is granted.

13. Since this motion, in accordance with the instructions of the court on June 29, 1962, heretofore referred to, is a renewal of one aspect of a motion previously made June 13, 1962, I respectfully refer the court to those portions of the Memorandum and Reply Memorandum submitted in support of that motion which deal with the relief sought under Federal Rule 15 (see pp. 10-13, 8-12, respectively).

Wherefore, it is respectfully submitted that this application should be granted in all respects.

Stuart N. Updike.

Sworn to before me this 20th day of November, 1962.

Charles T. Bates, Notary Public, State of New York, No. 60-0187205, Qualified in Westchester County, Cert. filed in New York County, Commission Expires March 30, 1963.

[fol. 192a]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Endorsement

60 Civ. 3511

ALLEGHANY CORPORATION

v.

KIRBY, ET AL.

ORDER DENYING MOTION TO AMEND COMPLAINT—
December 3, 1962

This motion to amend the complaint is denied. See transcript of hearing held on November 30, 1962. So ordered.

Dated: New York, N. Y., December 3, 1962.

Archie O. Dawson, U. S. D. J.

[fol. 193]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR., and FRED M. KIRBY, Defendants.

AFFIDAVIT OF WALTER L. STRATTON SUBMITTED IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT—Filed December 3, 1962

State of New York,
County of New York, *ss.*:

Walter L. Stratton, being duly sworn, deposes and says:

[File endorsement omitted]

1. I am an attorney duly admitted to practice in this Court and in the Courts of the State of New York. I am associated with the firm of Donovan Leisure Newton & Irvine, attorneys for defendants Allan P. Kirby and Fred M. Kirby herein. I am familiar with the facts stated herein and the prior proceedings in this cause.

2. This affidavit is submitted in opposition to a motion by plaintiff, Alleghany Corporation (Alleghany) brought on by notice dated November 20, 1962, for leave to file an "Amended and Supplemental Complaint" in the form attached to plaintiff's motion papers.

3. Over five months ago, Alleghany Corporation made a motion similar to the instant application. While the Court permitted various changes with respect to parties, substantive amendment was denied without prejudice to a new application. The Court directed that the new application be [fol. 194] made returnable in late August or early September and that it be for leave to file a new Complaint drafted along lines suggested by the Court and agreed to by counsel for plaintiff, Alleghany Corporation. (See Transcript of Proceedings before the Court, June 29, 1962.) Plaintiff has chosen not to follow the Court's instructions with respect either to return date of the motion or the substance of the Complaint. The application was not made within the time period set and the new proposed Amended and Supplemental Complaint is virtually identical to the one which was not permitted to be filed last June, except that allegations which had lain in six Counts in the June Complaint are now all tangled into one omnibus count asserted against all defendants in the November Complaint.

4. The defendants Kirby oppose the instant application on the grounds that it is not timely, that it is brought in bad faith, that the currently proposed Amended and Supplemental Complaint is in form even worse than the Complaint which this Court did not permit to be filed last June, that it misjoins parties and causes of action, that it is prolix, and that to allow its filing will result not only in confusion but in delay and further protraction of an

already extended and protracted litigation. Defendants Kirby submit that not only is it within the Court's discretion to deny plaintiff's instant application but that it would, in fact, be an abuse of discretion and would not be in the interests of justice to grant it.

5. We further submit that by reason of the omission of any reference in either of plaintiff's two proposed amended complaints to Count Two of the original Complaint that Count should now be dismissed, with prejudice.

> [fol. 195] (a) The November Complaint asserts virtually all of the claims contained in the June Complaint and does so in a form which is even more confusing and unfair.

6. The complaint proposed by Alleghany last June lay in six counts, alleging a number of claims and a variety of causes of action. In one aspect, the June Complaint sought to set aside the order of December 24, 1959 in *Breswick* v. *Briggs* (Federal Court action) and the settlement of *Zenn* v. *Anzalone* (Supreme Court, New York County) on the grounds of an alleged agreement between Kirby, Ireland and Phillips during October, November and December 1959. In another aspect the Breswick order and the Zenn settlement were attacked on grounds that Kirby had violated his fiduciary duties by concealing from plaintiffs' counsel and the courts in the earlier derivative litigation information and documents relative to the 1950 exchange transaction. (As a matter of fact, the 1950 exchange transaction was not a part of the complaint in *Breswick* v. *Briggs* and therefore the injunction which was lifted by Judge Dimock's order of December 24, 1959, it is submitted, had no reference to the *res judicata* effect of the state court's approval of the *Zenn* settlement insofar as that settlement included claims related to the 1950 transaction.)

7. Other claims asserted in the June Complaint sought directly to attack the 1950 exchange transaction itself, despite the fact that there are outstanding, as to the merits of the 1950 transaction, judgments in the state court and

releases to the defendants named in the *Zenn* complaint. Thus, in the June Complaint, plaintiff sought directly to attack the 1950 exchange transaction variously on grounds [fol. 196] of (a) common law fraud, (b) violation of Section 10(b) of the Securities and Exchanges Act of 1934, (c) violation of Section 14(a) of the same Act, and (d) violation of the laws of Maryland and New York. In the June Complaint, plaintiff also sought to recover a multitude of legal fees paid by Alleghany Corporation between 1954 and 1961.

8. The November complaint, proposes to continue and reallege every one of the claims of the June Complaint (except that plaintiff now seeks to recover a different selection of fees paid counsel and plaintiff has apparently dropped its prayer for declaratory relief that certain 1950 proxies were void). (For a more detailed comparison of the two complaints see Point I(A) of the Memorandum submitted herewith on behalf of defendants Allan P. Kirby and Fred M. Kirby.)

9. Five months ago, when plaintiff brought on its first application for leave to file an amended and supplemental complaint (the June Complaint), a hearing was had before this Court. At that hearing (which was on June 29, 1962) this Court fully expressed its views with respect to plaintiffs' then proposed amendments. The transcript of that hearing ran to 75 pages. The Court indicated that the form of amendment which it might view with favor was one which alleged a single cause of action (whether stated in one count or two) attacking the settlement of *Zenn* v. *Anzalone* on grounds of (a) the alleged existence of a conspiracy with Mr. Phillips in 1959; and (b) the alleged concealment by Mr. Kirby from plaintiffs' counsel and the Court in the earlier derivative litigation of facts and documents relating to the merits of the underlying causes of action therein, in particular, the 1950 exchange transaction. This Court repeatedly ruled that other claims should not be made a part [fol. 197] of the next proposed amended complaint. Thus, the Court asked:

> "The Court: Let me ask you this, Mr. Updike. If you don't set aside that settlement, even though there is a

separate theory on it [the 1950 transaction], you couldn't sue Mr. Kirby anyway, could you, on that 1950 transaction?

"Mr. Updike: No, unless the settlement is set aside, on one theory or the other, we have no claim against Mr. Kirby." [Transcript, page 37.]

And at page 45:

"The Court: . . . [I]t seems to me . . . this case can't go anywhere unless you set aside Zenn-Anzalone. You can set it aside on one of two theories, Mr. Phillips' corrupt agreement or Mr. Kirby's failure in his fiduciary duties, irrespective of Mr. Phillips entirely. If you do that you have got a cause of action to set aside the settlement and then for the relief which would follow, if you set it aside, I suppose then you can go ahead on Zenn-Anzalone."

And at page 72:

"The Court: . . . I am not going to allow the amendment as it is presently stated. And I don't think, Mr. Updike, if I were you I would put in all of those second, third, fourth, fifth, sixth, seventh, eighth and ninth causes of action that you have there.

"There is one cause of action, and that is to set aside the settlement, and what the consequences are."

The Court had previously stated what the consequences would be, if plaintiff prevailed, on the type of complaint which the Court proposed to allow:

"The Court: But from the standpoint of the proceedings in the [this] Court, why shouldn't this be a suit to set aside the settlement in Zenn-Anzalone? That is all it is. Then if the Zenn-Anzalone is set aside, it opens up the Zenn-Anzalone settlement, and then Mr. Carter can go ahead and say you are entitled to so much more money on the 1950 transaction, and if Mr. Palmer [Pomerantz] or any of Mr. Phillips'

friends want to come in and pursue some of the others, why, they can, I take it." [Transcript at page 60.]

[fol. 198] And at page 61:

"The Court: . . . If the Zenn settlement is set aside, then the Zenn settlement is set aside, and all hell can break loose over the lot."

And at pages 63-64:

"The Court: The whole settlement will be subject, because if they set aside the settlement on the basis of Mr. Kirby violated his duties, the settlement is set aside, and there is no settlement and there is nothing for you [Mr. Phillips] to get fees out of.

"Mr. Phillips: No settlement as to him, as to his contribution.

"The Court: That ends the whole settlement.

"Mr. McDonald: The whole settlement goes, because if the 1950 transaction is open, everything is open.

* * *

"The Court: . . . It is a question of whether the settlement is a valid settlement. If it isn't a valid settlement, either because you did something wrong or Mr. Kirby did something wrong, there is no settlement; there are no releases.

* * *

"The Court: . . . But it seems to me that we can keep this case on the tracks by making this a case to set aside the Zenn-Anzalone settlement on any theory that the plaintiffs can adopt to set aside that settlement. If it is set aside, the consequences of setting aside the Zenn-Anzalone settlement can then be taken up separately."

[fol. 199] 10. The foregoing rulings clearly demonstrate the Court's thinking in the premises. It is respectfully submitted that the plaintiff's proposed November complaint in no wise follows those rulings.

11. In another respect, however, the proposed complaint is even worse than the June complaint. At the June hearings, the Court had suggested that it might make for clarity if the two claims which the Court contemplated would be the substance of a later proposed amended complaint were stated in separate counts:

> "The Court: . . . Now, you can put it as a separate count in a cause of action if you want, but I think you know what we have got to do, and that is to keep this as one cause of action to set aside the Zenn against Anzalone, and you can have separate counts, if you want—it may make for clarity if you do—then prepare a proposed motion to amend your complaint, to do that, and I will pass on it when I come home from Europe.
>
> "Mr. Updike: Very good, sir." [Transcript at pp. 71-72]

12. Far from accepting the Court's suggestion that the plaintiff state those two claims in separate counts, plaintiff has stated not only those two claims but also the many additional claims that they had made with respect to the 1950 transaction (common law, state law, 1934 Act, etc.) and claims for various counsel fees all in one omnibus count levelled at all of the defendants together, regardless of causal connection between claim and defendant.

13. If this Court had anticipated that it would receive, on or about Labor Day, an amended complaint which would drop Count Two of the original complaint and would add a [fol. 200] count in which was succinctly set up plaintiff's new theory for attacking the *Zenn* settlement, so that the delay in these proceedings which would be engendered would be minimal, it is respectfully submitted that the Court must be sorely disappointed. None of those anticipations have been fulfilled.

14. In passing, it is worth noting that the clues as to what, specifically, it was that Mr. Kirby is alleged to have

concealed from the Court with respect to the 1950 transaction are faint, indeed. Paragraph 90 of the November complaint alleges, simply, that Mr. Kirby concealed "the bulk of the inside information alleged in Paragraphs 1 through 44 upon which his self-dealing in the 1950 exchange transaction was based." To the extent that preliminary comparison of the allegations of Paragraphs 1 through 44 with the *Zenn* record has been possible, it appears that the bulk at least of the information contained therein, far from having been concealed from plaintiffs' counsel and the Court in *Zenn* v. *Anzalone* is in fact included in the record of those proceedings.

[fol. 201]

(b) The instant application by Alleghany Corporation is not timely.

15. This action was commenced on September 8, 1960 as a derivative action brought by John D. Murchison, Clint W. Murchison, Jr. and by one Gerard Fossland, less than two weeks before the Murchisons filed 14B forms with the SEC announcing their intention to oust the Kirby management of Alleghany Corporation in a proxy fight. The filing of the complaint was heralded by a press release issued on behalf of the Murchison brothers by the public relations firm which served them in their proxy fight and newspapers throughout the country picked up and reported the charges of fraud against Mr. Kirby in some detail.

16. Shortly after filing their complaint counsel for the Murchisons admitted, in a companion action (See *Freeman* v. *Kirby et al.*, 60 Civ. 3502, Transcript of Arguments on November 16, 1960), that the Complaint in the instant action was not filed earlier because it was not until September 7, 1960 that his firm had what they thought was

> "evidence sufficient to satisfy ourselves that this fraud had been committed as distinguished from rumors and hearsay, and things which we did not feel sufficiently reliable." (Transcript, page 95)

They subsequently identified the witness who supplied them with this purported "evidence" as William E. Eppler. (See Transcript of Hearing before Judge McGohey, December 16, 1960, in *Murchison et al.* v. *Kirby et al.*, 60 Civ. 3511, at page 61.)

17. When Mr. Eppler's turn to be deposed came the proxy fight was over and the Murchisons had gained their [fol. 202] objective of control of Alleghany. Eppler's testimony was lengthy, not in small part due to the fact that his health restricted the length of the sessions of examination to half days. (He has since died.) On February 21, 1962, however, a memorandum was produced by him of a conversation he had had with Donald Carter, a Murchison associate, on March 9, 1960. (The memorandum was marked Defendant Kirby's Exhibit 156-4.) It developed that on March 9, 1960 Carter and Eppler were discussing a rumor Carter had heard that Ireland intended to recommend a fee of $1,000,000 for Randolph Phillips (WEE Dep. 1728). Carter said that if this information were true independent stockholders would intervene, call witnesses, including Eppler, and attempt to bring out whether any agreements with Phillips had been made, or contemplated, in connection with the final settlement (WEE Dep. 1730). According to Mr. Eppler's testimony:

> "A. I told him [Donald Carter] that I had no personal knowledge of any agreement that Mr. Kirby had made with Mr. Phillips, and that until I had evidence of an understanding or an agreement, if he called me to the stand, I would have to testify in all truth that I knew nothing about it." (WEE Dep. 1731)

Mr. Eppler confirmed that what he had told Donald Carter two years before was true at the time. The questioning continued:

> "Q. [By Mr. McDonald] . . . Mr. Eppler, after March 9, 1960, did you at any time obtain any addi-

tional or further knowledge of the facts relating to the settlement of the Zenn and Breswick litigation other than those you had at the time of your meeting with Mr. [Donald] Carter?

"A. No. . . : Not that I recall." (WEE Dep. 1733-4)

[fol. 203] 18. Six weeks after this testimony on March 30, 1962 (which was, I believe, the next occasion upon which the parties appeared before this Court) Mr. McDonald requested the Court to set May 1, 1962 as the date upon which the trial of Count One would begin. (See Transcript, March 30, 1962 at pp. 57-58.) That date, however, conflicted with the Court's calendar. Mr. McDonald then agreed to be ready for the trial of Count One "on any date that your Honor would pick" (Transcript pp. 57-58). (It was becoming apparent that plaintiffs did not really intend to proceed with Count Two at all.) Mr. Howard Carter on behalf of the plaintiffs agreed that he, too, wanted a prompt trial of Count One but needed the opportunity to complete certain depositions after defendant's examination of Mr. Eppler was finally concluded:

"The Court:

"Q. Can you finish all your depositions in a month, all those that you want to take?"

"Mr. Carter:

"A. I think so. Yes, Yes, I would think so." (Transcript, p. 68)

The Court having previously set May 11th as the terminal date for defendants' examination of Mr. Eppler, Mr. Carter's representation meant that plaintiffs' discovery would be completed by June 11, 1962. On June 13th, 1962, however, Alleghany served its first application to amend the complaint to add a vast array of new issues.

19. In proceedings before this Court on March 30, 1962, (See Transcript). Mr. McDonald reported that the defen-

dants were eager to proceed with the trial of Count One of this action.

[fol. 204] 20. Judge Dawson denied Alleghany's motion to be permitted to file an amended complaint in the form attached to the June motion papers, but did so without prejudice to a new application upon which he said he would pass on his return from Europe. Mr. Updike agreed to this proposal (See Transcript of June 29, 1962, at pp. 71-72). (My recollection of colloquy off the record is that Judge Dawson indicated that he would return from Europe sometime in late August.) Far from the application being made by Alleghany expeditiously, however, so that the moving and answering papers could be ready for Judge Dawson's return, say in the beginning of September, no papers were even served until November 20th.

21. On November 2, 1962, Special Master Arnold Bauman, called a meeting of counsel for November 6, 1962 for the sole purpose of scheduling further proceedings to be had before him. November 6, 1962 was Election Day. Neither Mr. Carter nor Mr. Updike attended the meeting. Their associate, Mr. Lee Meyer, however, was present.

22. The Special Master stated that in his view the parties were entitled to know, in light of the passage of time, whether plaintiff still intended to move to amend the Complaint. The scope of the deposition of Mr. Graubard would be materially affected by whether or not new issues were to be injected as to what had allegedly been concealed from Mr. Graubard and his associates and therefore from the courts in the earlier derivative actions. The Special Master therefore asked Mr. Meyer:

> [fol. 205] "The Special Master: . . . I would like you to address yourself to the subject of whether or not you are going to move to amend the complaint, because I do think that a reasonable period of time has gone by in which we are all entitled to be informed of that decision.

"Mr. Meyer: The answer is yes.

"The Special Master: When do you propose to do that, sir?

"Mr. Meyer: *We have no timetable at the moment but the amendment is prepared. . . .* " [Emphasis added]

(Transcript of Proceedings before the Special Master, November 6, 1962, at pp. 17-18.)

23. Your deponent does not know why plaintiff's motion was not made during that five month period; but respectfully suggests that the Court might inquire of plaintiff's counsel.

(c) Plaintiff's Application Is Not Made in Good Faith.

24. Under the preceding caption the circumstances of plaintiff's delay were set forth. It is respectfully submitted that these circumstances evidence that plaintiff's application is not made in good faith and that it would not be in the interests of justice for this Court to grant plaintiff's motion (See Rule 15(a), Fed. R. Civ. P.).

25. Other factors, too, indicate that plaintiff's application is made in bad faith and that it would not be in the interests of justice that the motion be granted. Plaintiff's failure to propose to assert against others, notably the Estate of Robert R. Young (from whom the Murchisons acquired the bulk of their initial holdings of Alleghany [fol. 206] stock), the new claims it now proposes to make against Allan P. Kirby casts further doubt on the bona fides of the application to amend the complaint. Not only was the Young Estate a party to the earlier litigation, but throughout the period during which the hearings were held before the Referee and the Special Master in the earlier derivative actions, Robert R. Young was Chairman of the Board and the chief executive officer of Alleghany Corpora-

tion. Upon information and belief, Young was greatly more familiar than was Allan P. Kirby not only with the circumstances of the 1950 exchange transaction, but also with the conduct of the derivative litigation, particularly in so far as it related to the 1950 transaction. This was true not only because of the scope of Young's duties, but also because he was a defendant with respect to that transaction in *Zenn* v. *Anzalone* and Young testified at length with respect to it. Kirby had not been served in *Zenn* and while Kirby had appeared in *Breswick* v. *Briggs,* the 1950 exchange transaction was not included in the Breswick complaint.

26. Furthermore, to the extent that plaintiff seeks ultimately to rescind the 1950 transaction or to obtain an accounting for profits received in that transaction, claims asserted against Mr. Kirby would appear to be limited to his own participation in those transactions. Mr. Young's participation in the 1950 exchange transaction was just as extensive (actually, by one share of IDS, more extensive) than Mr. Kirby's. Thus plaintiff's failure to pursue rights against the Young Estate for rescission with respect to the stock delivered to Mr. Young, or for an accounting for profits received by Mr. Young, raises questions as to plaintiff's good faith. Among those questions [fol. 207] are whether the new charges are sought to be made against Mr. Kirby for purposes other than the ostensible purpose, and whether the management of Alleghany has reason, which is not apparent, for not pursuing the proposed cause of action against the Young Estate.

Walter L. Stratton.

Sworn to before me this 27th day of November, 1962.

Patricia Krahel, Notary Public, State of New York, No. 41-7350985, Qualified in Queens Co., Certificate filed in New York County, Commission Expires March 30, 1964.

[fol. 208] Affidavit of Service (omitted in printing).

[fol. 210] [File endorsement omitted]

[fol. 211]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION,

vs.

ALLAN P. KIRBY, RANDOLPH PHILLIPS, FRED M. KIRBY, CHARLES T. IRELAND, JR.

Before: Hon. Archie O. Dawson, District Judge.

Transcript of Hearing—November 30, 1962

PRESENT:

Mr. Updike, Mr. Carter, Mr. Meyer,

Mr. Stratton, Mr. Kissam, Mr. Genovese, Mr. Whittlesley, Mr. McCann, Mr. Phillips.

COLLOQUY BETWEEN COURT AND COUNSEL ON MOTION TO AMEND COMPLAINT AND DENIAL OF THE MOTION

The Court: This is a motion which is made by the plaintiff to amend the complaint.

Mr. Updike, you want to speak on it?

Mr. Updike: Yes, your Honor, if I may. We have served a proposed pleading, which is annexed to the notice of motion here, which in our view follows and complies with the indicated directions of your rulings on the 29th of June last when you denied the application to serve the amended pleading that was then before you on that motion [fol. 212] but indicated in general terms a pleading that in your view would be allowable, and we believe that this present pleading, which contains one claim for relief only but which states two alternate theories, complies with your views at that time.

The two alternate theories which in our judgment are sufficient to warrant setting aside the settlement in Zenn

v. Anzalone are, first, the theory that there was a corrupt bargain between Mr. Kirby, Mr. Ireland and Mr. Phillips, and, the second theory, that regardless of the existence of that corrupt agreement the settlement can and should be set aside by reason of breaches of fiduciary duty by Mr. Kirby.

* * * * * * *

[fol. 213] The Court: Let me ask you this, Mr. Carter:

At the present time you could not litigate the 1950 transaction as long as the settlement in Zenn v. Anzalone is outstanding, could you? You would have to set aside that settlement first.

Mr. Carter: That is right.

The Court: Therefore you really have two steps, one to set aside the Zenn v. Anzalone settlement and then to prove the main cause of action; that is correct, is it not?

Mr. Carter: It seems to me they are almost indivisible.

The Court: In order to set aside Zenn v. Anzalone you say that you have to prove that there was some underlying basic cause of action?

Mr. Carter: Yes.

The Court: But really it comes in two steps, doesn't it? [fol. 214] You have to set aside Zenn v. Anzalone and then, if that is set aside, you have got a cause of action you can pursue, I take it.

Mr. Carter: No, I don't think that is quite the way we think of it because we believe that you would place upon us the burden of convincing you that there was merit to this so-called underlying cause of action. In other words, proof of the 1950 transaction, wherein we claim that Mr. Kirby breached his fiduciary duties to the stockholders of Alleghany, to us is an essential before the Court would be warranted in setting aside the Zenn v. Anzalone complaint, primarily because we are saying, in effect, that Mr. Kirby settled his potential liability at a sum far less than he otherwise would have been able to avail himself of.

So that there are two elements here. We have discussed this, as you recall, at some length on the 29th of June. One is the alleged corrupt agreement, and the other is the alleged breach of fiduciary duty by Mr. Kirby, and I think

that we are all agreed that if we prove out on either one of them we are entitled to recover.

The Court: Let me ask you this: Suppose you say that [fol. 215] that the Zenn v. Anzalone settlement should be set aside. Then I take it the plaintiffs in the Zenn v. Anzalone settlement, as well as you, could go in on the 1950 transaction, could they not?

Mr. Updike: May I speak to that, sir?

The Court: Yes.

Mr. Updike: It is our view that Alleghany itself having come into this case has, in effect, pre-empted the position with respect to it. It is possible that other shareholders can come along and can claim a right either to intervene here or claim that with respect to causes of action that are not asserted in this case that Alleghany's rights are not being fully protected. But, as far as this action is concerned, it is our view that Alleghany and Alleghany alone can maintain—

The Court: And Alleghany is only interested in the 1950 transaction, as I understand it.

Mr. Updike: Yes, sir.

The Court: Any other thing that is in Zenn v. Anzalone you are not pursuing.

Mr. Carter: That is correct.

Mr. Updike: That is correct. And partly in answer to the question that you raised a moment before, we have [fol. 216] cited to you, sir, these cases in the New York courts, and so far as I know none of the defendants have taken issue with them although they have had these citations before them for some time, but the Court of Appeals has said in the first one that we cited to you:

> "Attack on this settlement is the object and the only object of the suit, and accordingly a complaint directed to the conduct of the litigation and its settlement cannot be judged without the facts out of which the litigation and settlement arose."

That is the underlying—

The Court: I think that is undoubtedly correct.

Mr. Carter: That is consistent with what your Honor has been saying.

The Court: Yes, that is undoubtedly correct. But what bothers me about this proposed amended complaint that you have here is that now, after two years, we seem to be getting into a completely new type of litigation. Instead of the complaint as it was, to set aside the Zenn v. Anzalone settlement, this one demands a great deal of other [fol. 217] relief. It demands relief to set aside the settlement, that you rescind the transaction, that the Court enter judgment against Mr. Kirby for certain things, that in addition to all that the Court direct Kirby, Ireland and Fred Kirby to reimburse Alleghany for legal fees, render judgment with respect to plaintiff's attorneys' fees incurred herein on its behalf prior to the date of filing the complaint, and a lot of things like that.

[fol. 218] What I wonder is this: Why can't we handle this as you ordinarily would and try this case, as I suggested in June, as a suit to set aside the Zenn v. Anzalone settlement? If in connection with that you have to establish that there was a cause of action in Zenn v. Anzalone, of course that is all right, but you've got so many allegations in this complaint that go beyond that. For example, if I had your amended complaint, the first thing I would do would be to say that we'll have a separate trial on the issue of setting aside Zenn v. Anzalone. Then, if that is decided, we will go into the others. I think I said at the June discussion that is the regular way that we have done it in the past. I had the same situation last year in a case in this court. Because there is no sense going into proof of all of the underlying facts of the 1950 transaction and trying that if you come up and the settlement is a good settlement; you have just wasted your time.

Mr. Updike: May I speak to two of the things that you have mentioned? Your Honor raised the question about the inclusion in this complaint of a claim for legal fees and you mentioned it again just now, and from the record it was not clear as to whether you thought it was inappro-

[fol. 219] priate to this complaint, but it seemed to us that

since the legal fees arose in connection with the underlying litigation that it was appropriate for inclusion here. If it is not included here, I would believe that Alleghany would be under a duty to bring a separate action for them.

Now with respect to your second point, and the latter point, one of our theories with respect to the setting aside of the Zenn settlement is that Kirby breached his fiduciary duty.

The Court: In what respect?

Mr. Updike: In connection with that. First of all, we say he breached his fiduciary duty in not bringing before the Referee all of the facts which were known to him which bore upon the fairness of that transaction with respect to Alleghany Corporation, of which he was a director, an officer and the controlling shareholder.

What would be the facts that he did not adduce before Fitzsimmons? Those are the very facts that we rely on as having been concealed from the shareholders of Alleghany in connection with the Alleghany meeting at which the shareholders were asked to ratify and approve the [fol. 220] transaction, they are the very facts which under the insider theory we believe he acted on confidential inside information which was not available to the shareholders, and finally we say that even though he may not have fulfilled his duty with respect to the adducing of those facts before Referee Fitzsimmons, he certainly owed a duty to the Federal Court to adduce those facts in connection with consideration of the fairness when the problem came up before Judge Dimock and when the problem came up before Judge McGivern.

The underlying facts which go to the existence of the 1950 cause of action are the very facts which we say show a breach of his fiduciary duty in his failure to make a full, complete and fair disclosure with respect to a transaction where he was dealing on his own personal behalf with Alleghany Corporation.

The Court: Why can't you simply allege that he failed to reveal certain facts? You want this complaint to litigate the 1950 transaction. That is what bothers me. This com-

plaint seeks to litigate the 1950 transaction in an attempt to set aside the settlement.

It seems to me you've got two steps here. One is that [fol. 221] if you are going to set aside the settlement, then you can litigate the 1950 transaction or anything else which was covered by the settlement, but first of all you've got to set aside the settlement. That settlement may have been a fair settlement or an unfair settlement, but as long as it is a settlement it terminates any claim that you've got that was embraced in Zenn v. Anzalone.

Mr. Updike: But it does seem to me, and apparently I have not made myself clear, that the very facts which go to the breach of fiduciary duty by Mr. Kirby, the facts which he failed to reveal, are the facts with respect to the 1950 transaction which give rise to the liability in that regard.

The Court: Why can't you prove those under your present complaint?

Mr. Updike: I think we could prove them under our present complaint.

The Court: Then why do you need to amend your complaint?

Mr. Updike: For one, because we believe that Alleghany under New York law is entitled either to ratify the settlement and to recover the difference between the amount paid in settlement and the amount of a fair settlement, [fol. 222] that is one approach under the New York cases, or, in the alternative, Alleghany is entitled to have the transaction rescinded and have a return by Mr. Kirby—

The Court: Which one do you want?

Mr. Updike: We don't have to elect, I don't believe, sir, at this juncture.

The Court: You have a complaint now wherein you say you want to set aside the settlement. Now you come in and you say I want to amend that and I want to leave it all up in limbo. What do you want to do? I mean, instead of moving this litigation along, after two years you are getting into a more confused state. That is what bothers me.

Mr. Updike: It seemed to us, sir, that this amendment, instead of opening up the entire Zenn v. Anzalone litiga-

tion, was in the direction of simplifying it because it, instead of leaving all of the seven or eight causes of action involved in Zenn v. Anzalone open as far as this amended complaint is concerned, contemplates only one of those causes of action.

The Court: Of course, you can do that under the present [fol. 223] complaint. But if the Zenn v. Anzalone settlement is set aside, then the whole settlement is set aside and any one of the causes of action in Zenn v. Anzalone can be pursued.

Mr. Updike: That, as we said before, is a possibility. It is not part of what Alleghany here seeks.

The Court: No.

Mr. Updike: Another reason for amending the complaint was that we would set forth with specificity the bases upon which we thought the 1950 transaction was a fraud upon Alleghany, so that we would not be met with claims of surprise, we would not be met with charges that we were introducing an area of which the prior pleading did not give sufficient notice.

The Court: I don't see how anybody can claim to be surprised now after all of these documents that you've got—

Mr. Updike: You asked me why we wanted to amend.

The Court: That is why you want to amend. But what bothers me is that the amendment seeks now to litigate the 1950 transaction as part of the setting aside of the [fol. 224] settlement.

It seems to me also, as I said in June, that what you have to do is to set aside the settlement before you litigate the 1950 transaction. Maybe you can bring up some of the things about the 1950 transaction in setting aside the settlement, but one issue here is can you set aside that settlement, and that I don't know. That depends upon what your proof is in setting aside the settlement.

The settlement may be a very inadequate amount. Nevertheless, if it is a settlement, it is a settlement. We settle

cases every day in this court for amounts which probably the parties think are inadequate, but if they are settled they are settled.

Mr. Carter: Right on that point, your Honor, in trying it on that theory, wouldn't you rightfully expect the plaintiffs, as part of their proof, to go into all of the circumstances, pertinent circumstances, surrounding the 1950 IDS transaction to show you that the cause of action alleged in Zenn v. Anzalone complaining of that situation had merit?

The Court: Well, only to the extent, as Mr. Updike says, that if Mr. Kirby was withholding something from the Court then maybe it would be relevant, but I don't see that [fol. 225] the extent of the potential recovery is necessary proof any more than somebody who settles a case for personal injury and gets $1000 can say that if he went to court he could get $50,000 on the thing. He settled it.

Mr. Carter: Yes. From my observation I was trying to draw a distinction between what Mr. Kirby failed to disclose to the Court or to the Referee, as the case might be, and his conduct in connection with the 1950—

The Court: His conduct would be relevant, certainly. But the fact that he had a potential liability which he settled for a relatively small amount, let us, does not, it seems to me, affect the settlement if it was a settlement bona fide arrived at and nothing withheld from the Court.

A settlement is a settlement. Everybody in a settlement is subject to a certain amount of give and take.

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[fol. 226] Mr. Updike: This problem was before the Appellate Division, First Department—I was going to say last year, but I guess it is in 1960, and that court squarely held that the plaintiff will have to establish that he had a valid and existing claim against the defendant at the time that the compromise to enable him to recover here, and since the trial of the issue of fraud will involve much of the same matters as the trial of the entire action, it would be improvident to order a separate trial of that issue.

The Court: That is why I disagree with the Appellate Division. I don't think it is improvident. Where you got a settlement I think the first thing to do is to decide whether the settlement should be set aside. Mr. Carter says you can bring out the underlying facts under the present complaint. I don't like this amended complaint in the sense that it seems to expand the present suit into something which is different from merely setting aside the settlement.

• • • • • • •

[fol. 227] The Court: My recollection of what I said during the conference was a little bit different from that.

Mr. Stratton: My affidavit at page 6, your Honor, 5 and 6, covers the portions I believe you are referring to.

The Court: I said at the June conference:

"It seems to me"—

Mr. Carter: What page are you on, your Honor?

The Court: I am quoting from Mr. Stratton's brief, pages 63 and 64.

> "It seems to me that we can keep this case on the tracks by making this a case to set aside the Zenn-Anzalone settlement on any theory that the plaintiffs can adopt to set aside that settlement. If it is set aside, the consequences of setting aside the Zenn-Anzalone settlement can then be taken up separately."

That is what I said at the time. That, it seems to me, is the logical way this case should proceed.

If it proceeds that way, then if that settlement is set [fol. 228] aside, you then can decide what you are going to do having set aside the settlement. If the settlement isn't set aside, we have simply wasted a lot of time by going into an issue which can't be decided in view of the settlement.

Now, if you have to prove some of the underlying facts which are involved in Zenn-Anzalone to set aside the settlement, of course, you have to do that. But it doesn't seem to me that you have to litigate the whole 1950 transaction.

Mr. Updike: As we viewed it, the posture of the proof, let us say, with respect to what was before the referee in

order to establish that Mr. Kirby did breach his fiduciary duties at that time in failing to make a full and fair disclosure, there will have to come before you, first of all, what was disclosed, and, second, what was not disclosed, what was withheld.

The Court: Yes, I understand that.

Mr. Updike: That which was withheld constitutes the basis upon which we think the 1950 IDS transaction should be set aside, so that you will have before you in quantum all of the facts that relate to that transaction. Whether [fol. 229] those facts give rise to a liability on one of the several alternate theories that we had in mind in drafting this pleading is, perhaps, not important. We thought we ought to put them in. They could be left out.

As I understood your ruling, sir, you were going to permit us to try to set aside the Zenn v. Anzalone settlement on either the corrupt-agreement theory, which is well covered by the present complaint, or on the theory of a breach of fiduciary duty, and as we evaluated the proof with respect to the breach of fiduciary duty, it took us into all of these facts with respect to the 1950 exchange transaction.

The Court: I should think that you would be in a position to go ahead on the trial very promptly on the issue setting aside the Zenn v. Anzalone settlement. Whether you are going to be ready to prove or the defendant is going to be ready to sustain the 1950 transaction is another matter, but the whole problem of setting aside that settlement is something which ought to be tried and ought to be tried soon.

Mr. Carter: If I follow your Honor correctly, are you suggesting first, that we go in and try and set aside the Zenn settlement on either of the two theories that we have [fol. 230] been discussing, and then, if you do set it aside—

The Court: A separate trial—

Mr. Carter: Be held in connection with the voidability of the 1950 transaction.

The Court: The consequences of the 1950 transaction. That would be a separate trial.

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[fol. 231] The Court: Then why don't you simply go ahead on your present first cause of action, and if somebody will notice the case for trial it may be able to get into a slot for this spring, sometime—not for February—but [fol. 232] if it doesn't get into a slot pretty soon it is not going to go to trial for another year.

It seems to me that it has been hanging around long enough to go to trial, at least on the issue as to whether the settlement should be set aside. If the settlement is set aside then there will be a second series in it in which the effect of setting aside the settlement will have to be decided. But I can't see the sense of wasting the time of the Court in trying an underlying issue that may become moot if the settlement isn't set aside.

* * * * * * *

[fol. 233] The Court: I will say this: I am going to deny the present motion to amend the complaint. If the plain-[fol. 234] tiff wants to make a simple amendment to the complaint to allege that Mr. Kirby failed in some fiduciary duty to reveal something in connection with Zenn v. Anzalone which they can plead in one paragraph, I will accept such an amendment. But I will not accept the present amendment.

I think the effect of it will be merely to complicate and delay this litigation. I am hopeful that somebody will file a notice of readiness for trial very promptly and precipitate that issue.

Mr. Stratton: Your Honor, if there is to be such an amendment, could they declare with specificity just what it is that was concealed from the earlier court rather than this 44 paragraph summary of the history of IDS, which was largely before the case in Zenn?

The Court: Let's do this: Let's say that the plaintiffs have ten days from today within which to file any proposed amendment to their complaint. Then, within ten days, we will have that.

I am not going to ask them to draw it right here extemporaneously but within ten days, if there is to be any amendment to the complaint, it shall be filed.

[fol. 235] Mr. Phillips: Your Honor, would you include, as Mr. Stratton suggests, that the documents be identified that allegedly are suppressed in order to shorten the time—

The Court: That we will have to pass on when they submit their proposed amendment. I don't know what their amendment is going to say.

Mr. Updike: As I understand the Court's ruling, the effect of the amendment will permit us to prove so much of the 1950 IDS exchange transaction as is related to our charge of breach of fiduciary duty on the part of Mr. Kirby.

The Court: I don't think that is so. I don't think that we are going to try the 1950 transaction.

Mr. Updike: I didn't say that, sir. If I did say it, I misspoke myself.

The Court: Yes. Your contention is that Mr. Kirby concealed certain things from the Court or the referee, and that that was where he breached his fiduciary duty.

If you want to state that in an amendment to the complaint, that is simple. But if you want to state all the facts about the 1950 transaction, that involves another lawsuit, [fol. 236] which is unnecessary, because if the Zenn v. Anzalone settlement is set aside then you can pursue the 1950 transaction.

Mr. Updike: I want to be able to prove enough of the facts with respect to the 1950 transaction as are relevant to the issue of the breach of his fiduciary duty by his failure fully and fairly to disclose the transaction.

Mr. Phillips: Your Honor, the referee's report shows the facts.

The Court: But that is another matter. But it seems to me that all you have got to do is to say here he has a large claim and there were certain facts that he concealed; did he conceal these facts which he was under a fiduciary obligation to reveal to the Court and the referee.

The Court: If you want to do that then you have an issue which is a very simple one. But you don't have to go into proving the 1950 transaction. We may never get to that. If the settlement is set aside then the door is open to go into the whole 1950 transaction.

[fol. 237] Mr. Carter: There is only one thing that bothers me on that latter statement of yours, Judge, and I think this type of discussion is healthy, since you have inherited this problem, and it is simply this: Forget for the moment Mr. Kirby's alleged breach of the fiduciary duty, concentrate on the fraud aspects of the agreement, corrupt and so forth.

Now, we are going to try that. Just what modicum of proof, what burden of proof would you expect the plaintiffs to assume in support of what we call the underlying transaction, which would, of course, be the 1950 transaction?

The Court: I suppose the modicum of proof would be that there was a large claim against Mr. Kirby, that Mr. Kirby was worried about it, Mr. Kirby, as you say in your complaint, was advised might have a liability of $32,000,000, or something like that. I don't think you have to prove that he actually was liable. You have to prove that there was a large claim, that he was worried about it, that he had an obligation to reveal certain things to the Court or Referee, and he didn't do it.

If that is so, why, then, maybe you have a cause of action [fol. 238] there. But I don't think you have to prove the very thing that you are going to have to prove if the settlement is set aside, because that is another lawsuit, that is another trial.

Mr. Updike: That is the way we viewed the New York law, as placing that responsibility on us.

The Court: They have a lot more judges over there. They can take those things up that way. Here we have to get the thing moving.

[fol. 239]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 60-3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR., and FRED M. KIRBY, Defendants.

ORDER TO SHOW CAUSE—December 7, 1962

Upon the annexed affidavit of Stuart N. Updike sworn to December 7, 1962, the orders made herein by the Honorable Archie O. Dawson on June 29, 1962, and November 30, 1962, respectively, and upon the proposed Amended and Supplemental Complaint annexed hereto, it is hereby:

Ordered, that defendants show cause before me in Chambers, Room 2102, United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York at 4:30 o'clock in the afternoon of the 14th day of December 1962 or as soon thereafter as counsel may be heard, why an order should not be made and entered herein pursuant to Federal Rule 15 granting Alleghany Corporation leave to file and serve an Amended and Supplemental Complaint in the form submitted herewith; and it is further

Ordered, that service of a copy of this Order and the papers annexed hereto upon Randolph Phillips, Pro Se, and the attorneys for the other defendants herein by serving them personally or by leaving a copy hereof at their respective offices on or before 4 p.m. on the 10th day of December 1962 shall be deemed good and sufficient service hereof.

Dated: New York, New York, December 7, 1962.

Archie O. Dawson, U.S.D.J.

[File endorsement omitted].

[fol. 240]

ATTACHMENT TO ORDER TO SHOW CAUSE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 60-3511

[Title omitted]

AFFIDAVIT OF STUART N. UPDIKE

Stuart N. Updike, being duly sworn, says:

1. I am an attorney admitted to practice in this Court and in the courts of the State of New York, and I am a member of the firm of Townley, Updike, Carter & Rodgers, attorneys for plaintiff herein. I have participated in this litigation since its inception and am generally familiar with the proceedings since then.

2. I make this affidavit in support of the renewal, following the order of this Court dated June 29, 1962, of an application by Alleghany Corporation pursuant to Federal Rule 15 for an order granting leave to serve and file an Amended and Supplemental Complaint in the form annexed to the present notice of motion. It is brought on by order to show cause so that the matter may be heard within ten days of the last motion as indicated by the Court on November 30, 1962.

3. Since this is a renewal of motions previously made by the plaintiff for similar relief, I respectfully refer the Court to my prior supporting affidavits dated June 12, 1962, November 20, 1962, and November 30, 1962, the Memorandum and Reply Memorandum submitted in support of the motion made June 13, 1962, and Reply Memo-
[fol. 241] randum submitted in support of the motion dated November 20, 1962, insofar as those memoranda deal with relief sought under Federal Rule 15.

4. In preparing the complaint submitted on this renewal of the motion for leave to amend, I reviewed the Court's instructions as carried in the transcript of the hearings held November 30, 1962, with respect to the content of an amended complaint that would be suitable to the Court. I believe that I have proceeded accordingly.

5. In previous applications, particularly in my affidavit of November 30, 1962, I stated to this Court my views as to the nature of the rights of the plaintiff corporation in its efforts to bring Mr. Kirby to account on a matter that has been in litigation for the past decade.

6. In the present application I have made every effort to comply with the Court's views as to the manner in which the corporation should proceed to vindicate its rights. Ultimately, as I have contended before, Alleghany Corporation is entitled to a trial on the merits of its claims against Mr. Kirby. The present proposed complaint is an effort to facilitate such a trial or trials in accordance with the Court's instructions.

Wherefore, I respectfully request the Court to grant the relief sought on this motion.

Stuart N. Updike

Sworn to before me this 7th day of December, 1962.

Margaret K. Garvey, Notary Public, State of New York, No. 31-1382075, Qualified in New York County, Commission Expires March 30, 1963.

[fol. 242]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, FRED M. KIRBY, CHARLES T. IRELAND, JR., Defendants.

Before: Hon. Archie O. Dawson, District Judge.

Transcript of Hearing—December 14, 1962

APPEARANCES:

Townley, Updike, Carter & Rodgers, Esqs., Attorneys for plaintiff;

Stuart N. Updike, Esq., J. Howard Carter, Esq., and Lee W. Meyer, Esq., of Counsel.

Donovan Leisure Newton & Irvine, Esqs., Attorneys for defendants Allan P. Kirby and Fred M. Kirby;

Walter L. Stratton, Esq., of Counsel.

Randolph Phillips, Defendant, pro se.

Kissam & Halpin, Esqs., Attorneys for defendant Charles T. Ireland;

Leo T. Kissam, Esq., and Anthony J. Genovese, Esq., of Counsel.

[fol. 243]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: This is your motion, Mr. Updike. What do you have to say on it?

* * * * * * *

[fol. 244] Mr. Stratton: I would like to address myself to that, your Honor.

The Court: All right. I think the rulings that the Court has made on June 29th and on November 30th are very clear that what we are pointing to is a trial of the issues of the alleged concealment by Mr. Kirby of documents relating to the 1950 transaction and the alleged conspiracy with Mr. Phillips relating to corrupting him in the fall of 1959, and what we are not going to try, at least in a first trial, are the merits of the 1950 exchange transaction itself. That your Honor has repeatedly said would be put over until a later trial, and if the plaintiffs were to prevail in the initial trial.

With that clear understanding, and with no further discovery or no discovery with respect to the merits of the 1950 cause of action, the discovery will then be limited to a cleanup with respect to the 1959 conspiracy and will be related to what documents are alleged to have been concealed.

The complaint as it previously stood, or as it was previously proposed, and this complaint are very vague and conclusory about that, and it is boiled down into two para-[fol. 245] graphs in this complaint.

In paragraph 39 in particular they describe these facts which were not disclosed as facts relating—paragraph 39, the bottom of page 6 and the top of page 7—to the financial well being in effect of IDS in 1950, and facts relating to the effectuation of the 1950 exchange transaction.

We have never had any particularity about just what facts those were that were alleged to have been concealed, and we will presumably have to find that out by interrogatories before we can really say just how much discovery we are going to have to do in the nature of depositions. But we can have our interrogatories prepared very shortly, and can probably give the Court a much better idea of the scope of pretrial discovery that we will have to have after that.

I say interrogatories. I should include also a Rule 34 motion for the production of these documents.

The Court: Let me ask you this: As I see it in this case—and I may be wrong—the first stage of the case will be a trial as to whether the Zenn settlement should [fol. 246] be set aside on the ground that it was corrupt—

Mr. Updike: I think there are two theories.

The Court: —and on the ground that something was concealed from the Court in connection with the 1950 transaction. It will not go into the issue as to whether the 1950 transaction was a bad transaction or not; it will go into the question of whether certain facts were concealed from the Court.

Is that understood by everybody?

Mr. Stratton: Yes.

Mr. Updike: Yes.

The Court: Then if we set aside the Zenn settlement, we then go on to the next step, which is was there a liability under the 1950 settlement, which may be a separate trial.

What you want to find out is what things were concealed in the 1950 transaction.

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[fol. 247] Mr. Kissam: Judge, can we get this, though: The form of how it is done I don't think is important, so long as it is clearly on the record. Can we get a definite ruling by you that after the conclusion of the so-called first trial the defendants will be given an opportunity to prepare on the merits all matters incorporated in this pleading which relate to the 1950 cause of action? That is the thing that concerns me, whether we are getting in any kind of a preclusion situation by reason of the pleading existing—

The Court: What do you need? Mr. Stratton is talking as though he is going to prepare that—

Mr. Stratton: That is what we don't want to prepare, your Honor.

The Court: Then you don't need any more depositions at all, do you?

Mr. Stratton: No. But the point is there is a difference in preparing it on the merits, preparing that entire cause [fol. 248] of action as it was pleaded in Zenn, and preparing to find out just what is alleged to have been concealed. That is all we want to look in now—

The Court: I see. I think if we try the first issue, certainly there will have to be time enough to meet the issue of the 1950 transaction on the merits. Certainly there will have to be time enough for that.

* * * * * * *

[fol. 249]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 60-3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR. and FRED M. KIRBY, Defendants.

AMENDED AND SUPPLEMENTAL COMPLAINT—
Filed December 18, 1962

Plaintiff, by its attorneys, Townley, Updike, Carter & Rodgers, as and for its amended and supplemental complaint herein, respectfully alleges upon information and belief:

1. (3)* Plaintiff (sometimes hereafter "Alleghany") is a corporation organized and existing under the laws of

[File endorsement omitted]

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* For convenience, numbers in parentheses cross-refer to those paragraphs in the original complaint in this action which are substantially similar to the paragraphs pleaded herein.

the State of Maryland, qualified to do business in the State of New York and actively engaged in the transaction of business in that State, with its principal place of business at 350 Park Avenue, City and State of New York.

2. (4) The principal business of Alleghany consists of owning and holding securities of railroad and other corporations.

3. (5) Investors Diversified Services, Inc. (sometimes hereafter "IDS") is a corporation organized and existing under the laws of the State of Minnesota.

4. One of the principal assets of Alleghany is its holding of a block of shares of the voting and non-voting stock of IDS, such block comprising in excess of 47% of the total voting shares outstanding and in excess of 9% of the total non-voting shares outstanding.

5. (8) Defendant Allan P. Kirby (hereafter "Kirby") is a resident and citizen of the State of New Jersey, owns beneficially or controls in excess of 3,250,000 shares of a total of 9,849,172 outstanding shares of Alleghany common stock, and is the largest shareholder of Alleghany common stock.

6. In 1949 Kirby owned or controlled in excess of 500,000 shares of a total of 4,567,797 outstanding shares of Alleghany common stock, and by September 8, 1960, had increased his holdings to at least 750,000 shares of a total of 5,291,371 outstanding shares of Alleghany common stock. By virtue of such ownership Kirby had the power to exercise effective working control of Alleghany through-
[fol. 250] out the period January 1, 1949 to May 23, 1961, when the results of a proxy contest were certified.

7. Between October, 1948 and January 9, 1961 Kirby was President of Alleghany Corporation and between January 29, 1958 and May 23, 1961 Kirby was also chairman of the Board of Directors of Alleghany.

8. Throughout the period January 1, 1949 to January 25, 1958 Kirby and Robert R. Young (hereafter "Young") dominated and controlled the corporate acts and policies of Alleghany, and after the death of Young on January 25, 1958 until May 23, 1961 Kirby alone exercised such domination and control.

9. Defendant Randolph Phillips (hereafter "Phillips") is a resident and citizen of the State of New York, was a director of IDS from April 19, 1960 to April 25, 1961, and was employed as a consultant to the then management of Alleghany from July 1, 1960 to March 31, 1961.

10. Defendant Charles T. Ireland, Jr. (hereafter "Ireland") is a resident and citizen of the State of New York, and a member of the bar of said State, was an officer of Alleghany from November 13, 1959 until May 24, 1961, and a director of Alleghany from December 29, 1959 to May 23, 1961, and was a director of IDS from April 19, 1960 until July 18, 1961.

11. Defendant Fred M. Kirby is a resident and citizen of the State of New Jersey, was a director and a member of the Executive Committee of Alleghany from January 29, 1958 until May 23, 1961 and a vice president of Alleghany from January 12, 1961 until May 24, 1961 and was a director of IDS from April 19, 1960 until July 18, 1961.

12. Jurisdiction of this action is founded upon diversity of citizenship and upon this Court's inherent jurisdiction.

13. (18) The amount in controversy exceeds $10,000, exclusive of interest and costs.

14. (21) In 1954 and 1955 various derivative actions (sometimes hereafter "Derivative Actions") were commenced in the federal and state courts in the State of New York, against Alleghany, Kirby, the then directors of Alleghany and others by certain stockholders of Alleghany.

15. (22) One such derivative action was commenced in the United States District Court for the Southern District of New York under the caption of *Breswick & Co., et al.* v. *Briggs*, et al., (S. D. N. Y. Civil Action No. 98-371).

16. (23) Ten such derivative actions were commenced in the Supreme Court of the State of New York, New York County, and were ultimately consolidated under the caption *Zenn, et al.* v. *Anzalone, et al.*, (Sup. Ct. N. Y. Co. Index No. 7244/1954) (hereafter "*Zenn* (State)").

[fol. 251] 17. Thirteen such derivative actions were commenced in the United States District Court for the Southern District of New York and ten of these were ultimately consolidated under the caption *Zenn, et al.* v. *Anzalone, et al.*, (S. D. N. Y. Civil Action No. 92-205) (hereafter "*Zenn* (Federal)"). *Zenn* (Federal) was, at all times material hereto, and still is, pending.

18. One firm of attorneys thereafter was authorized to act as general counsel for all plaintiffs in both *Zenn* (State) and *Zenn* (Federal) and to serve consolidated amended complaints therein.

19. (25) The complaints in the above-mentioned Derivative Actions in substance charged on behalf of Alleghany among other things, various instances of mismanagement, diversion of corporate opportunities, self-dealing and malfeasance on the part of Kirby and others.

20. Among the claims asserted in *Zenn* (State) and *Zenn* (Federal) against Kirby and others was a demand asserted derivatively on behalf of Alleghany for rescission of, or, in the alternative, damages and an accounting for profits with respect to a transaction in May, 1950 between Kirby and Alleghany in which Kirby exchanged 2,420 shares of Alleghany Series A preferred stock held by him for 24,062 shares of IDS Class A stock owned by Alleghany (plus $27.79) (which transaction is sometimes hereafter called "the 1950 Exchange Transaction"). Said claim was alleged as the first cause of action in the Consolidated

Amended Complaint in *Zenn* (State) and as Count II of the Consolidated Amended Complaint in *Zenn* (Federal).

21. The aforesaid claims on behalf of Alleghany against Kirby were valid and meritorious because the 1950 Exchange Transaction

(a) was and is void and voidable under the laws of Maryland and New York;

(b) constituted a scheme to defraud Alleghany in violation of Section 10(b) of the Securities Exchange Act of 1934 and the Rules and Regulations promulgated thereunder;

(c) was purportedly ratified by use of proxies procured in violation of Section 14a of the Securities Exchange Act of 1934 and Rule X-14a-9 of the Securities and Exchange Commission promulgated thereunder.

and, in consequence thereof said transaction between Alleghany and Kirby should have been rescinded.

22. (24) A separate but related action, *Breswick & Co., et al.* v. *United States* (S. D. N. Y. Civil Action No. 101-114) was commenced in 1955, seeking an injunction prohibiting certain capital stock exchanges contemplated by Alleghany.

23. (26) Defendant Phillips was one of the plaintiffs in *Breswick* v. *United States,* acted as financial consultant [fol. 252] and advisor to certain of the plaintiffs in *Breswick* v. *Briggs,* and acted as financial consultant and advisor to an attorney for the objectant Samuel R. Rosen in *Zenn* (State). Phillips took an active part in the proceedings before the federal and state courts and, in addition, in *Breswick* v. *Briggs* appeared as a witness. The plaintiffs (and their counsel) employing Phillips as such advisor and consultant were sometimes known and were frequently referred to as the "Phillips group".

24. (27) The following events led to and surrounded the commencement and litigation of the *Breswick* v. *Briggs* and *Breswick* v. *United States* actions:

(a) On three separate occasions, from 1939 to 1955, Phillips had been temporarily hired by Young on behalf of Alleghany or one of its affiliates. The first and second such hirings were on special assignments;

(b) On the last such occasion, Phillips' services were utilized in connection with proxy solicitation on behalf of Alleghany in Alleghany's successful contest for control of the New York Central Railroad Company (hereafter "New York Central") in 1954;

(c) Upon the successful completion of the proxy contest, Phillips demanded of Young and Kirby that he be placed in one or more senior positions with the New York Central or Alleghany, for none of which Phillips was qualified by experience or training. One such demand was that, although Phillips was not a lawyer, he be placed in a position whereby he would have ultimate authority over and direction of the legal department of the New York Central;

(d) After the refusal of Young to accede to Phillips' demands, Phillips' employment was terminated by direction of Young with the approval of Kirby on September 30, 1954;

(e) Shortly thereafter, Phillips set about using the information he acquired in the course of the foregoing employments, to attempt to organize activity among the Alleghany stockholders against Kirby, Young and others. He charged Kirby, Young and others with waste and mismanagement, and additionally charged Kirby with neglect of his duties and with lack of capacity to perform them. As part of Phillips' organizing activity, he promoted the formation of the so-called "Protective Committee for Common Stockholders of The Alleghany Corporation";

(f) By the spring of 1955, the "Protective Committee", with Phillips as chairman, was actively soliciting proxies to place Phillips, among others, on Alleghany's Board of Directors;

(g) On June 6, 1955, *Breswick* v. *United States* was commenced with Phillips in the role of co-plaintiff. Meanwhile, both *Zenn* (State) and *Zenn* (Federal) had [fol. 253] been started in 1954, and *Breswick* v. *Briggs* had followed on February 14, 1955.

25. (28) By reason of his apparent possession of superior and confidential pertinent information, and as a result of the other activities described in paragraphs 23 and 24, Phillips secured substantial dominance and control over the *Breswick* v. *Briggs* action and over one or more of the objecting stockholders in the *Zenn* (State) action. By such dominance and control, coupled with the effect of the *Breswick* v. *Briggs* order of October 27, 1955 (hereafter referred to in paragraph 31), Phillips was able to and did play a leading part in opposing the then proposed offers of settlement in *Zenn* (State) and preventing the consummation of such settlement in both courts.

26. Phillips occupied a fiduciary relationship to Alleghany and to its shareholders with respect to *Zenn* (State), *Zenn* (Federal) and *Breswick* v. *Briggs* at all times material hereto and, in particular, with respect to all subsequent settlement negotiations hereafter referred to.

27. Phillips and the attorneys and Alleghany shareholders with whom he was associated each owed a fiduciary duty to disclose to and to seek revelation to this Court, to the New York State Supreme Court and to Alleghany and its other shareholders, all facts relevant and material to an evaluation by this Court, by the New York Supreme Court and by Alleghany and its other shareholders of the claims asserted against Kirby and others in *Zenn* (State), *Zenn* (Federal) and *Breswick* v. *Briggs* and of the offers of settlement made in said actions.

28. (29) *Breswick* v. *United States* proceeded to trial before the three-judge statutory court. Plaintiffs' motion for a preliminary injunction was granted on July 25, 1955 (134 F. Supp. 132); a permanent injunction followed on November 18, 1955 (138 F. Supp. 123), which injunction was appealed to and reversed by the United States Supreme Court (353 U. S. 151).

29. (29) In *Zenn* (State) no answers were filed, settlement negotiations having been promptly commenced. Kirby did, however, serve an answer in *Zenn* (Federal) on or about November 18, 1954.

30. (30) In July, 1955 a stipulation of settlement, subject to the approval of the state court as to its fairness and adequacy, was entered into by certain of the parties in *Zenn* (State); and by order of the state court in August, 1955, Robert J. Fitzsimmons, Esq. was appointed Referee to inquire into the fairness, reasonableness and adequacy of the proposed settlement of July, 1955, and to report to the state court as to whether such proposed settlement should be approved and confirmed. Kirby joined in said proposed settlement and was one of its proponents in the State Court.

[fol. 254] 31. (31) On motion of the plaintiffs in *Breswick* v. *Briggs* (sometimes hereafter *"Breswick"*), this Court on October 27, 1955 enjoined the defendants therein *inter alia* from "Interposing in this action any defense based upon any judgment entered in any action other than this action, pursuant to any agreement not negotiated with the [Breswick] plaintiffs or their attorneys, . . ."

32. (32) On September 11, 1956 the defendants in *Breswick* moved this Court to vacate its order of October 27, 1955, on the ground, among others, that the need for such order no longer existed in light of the negotiations for settlement of the *Zenn* and *Breswick* actions which had been conducted with the *Breswick* complainants since the entry of the October 27, 1955 order.

33. (33) Thereupon this Court, by order dated October 3, 1956, appointed Robert J. Fitzsimmons, Esq. the Referee previously appointed by the state court, as Special Master in the District Court to hear and report whether the order of October 27, 1955 should be vacated or modified.

34. (34) Hearings were held before Mr. Fitzsimmons, acting as Referee, from September 19, 1955 to January 20, 1956, and as Special Master during October and November, 1956.

35. During the course of said hearings opponents of the proposed settlement made repeated requests, both oral and written, to take Kirby's testimony with respect to the claims alleged in *Zenn* (State), including the claim based upon the 1950 Exchange Transaction.

36. Although Kirby was a proponent of said settlement, he never testified before the Referee, having been excused by the latter on grounds of ill health.

37. (35) The Referee and Special Master thereafter rendered his respective reports to both the state and federal courts on November 17, 1958. Each report, in substance, recommended approval of the settlements proposed.

38. By reason of Kirby's relationship to Alleghany as director, officer and controlling shareholder who had acquired Alleghany property in a transaction with Alleghany, and by reason of his position as a proponent of the settlement aforesaid, Kirby was under duties to disclose or cause to be disclosed to the Referee, to the Special Master, to this Court and to the New York Supreme Court, all facts concerning the 1950 Exchange Transaction material to a determination by said official and said courts of Kirby's liability to Alleghany on the 1950 Exchange Transaction and the fairness and adequacy of the proposed settlement with respect to said liability.

39. Kirby failed to discharge the duties heretofore alleged in paragraph 38 by failing to adduce or cause to be

adduced before the Referee, Special Master, this Court or [fol. 255] the New York Supreme Court (a) facts which at the time of the 1950 Exchange Transaction he knew or should have known concerning the financial condition, future earnings and prospects of IDS and the ability of IDS to meet its contractual requirements and (b) facts and circumstances concerning the purported authorization of said 1950 Exchange Transaction by the Board of Directors of Alleghany, and the steps in consummation thereof, all of which were material to an evaluation of his liability on the claims arising out of said 1950 Exchange Transaction and the settlement proposed in connection therewith.

40. The Referee's Report heretofore referred to in paragraph 37 materially misquotes Article EIGHTH of Alleghany's Articles of incorporation in effect at the time of the 1950 Exchange Transaction as a basis for his conclusion that directors directly and personally dealing with Alleghany could be counted for purposes of a quorum to consider or vote upon such dealings, that the Directors action of December 6, 1949 was valid, and, that the proxy solicitation matter in respect thereto was not materially false and misleading to the shareholders of Alleghany.

41. (36) Following opposition by Phillips and certain of the stockholders and others controlled by him to confirmation of the Special Master's findings and recommendations, this Court on September 22, 1959 rejected the Special Master's report and referred the matter back to him for further findings as to whether the *Breswick* v. *Briggs* injunction order of October 27, 1955 should be dissolved after hearings on the question of the settlement value of the whole case and its relation to the settlement offers heretofore made in *Zenn* (State).

42. (39) Following the rejection by this Court on September 22, 1959 of the Special Master's Report:

(a) Kirby was informed by Phillips through Ireland that Kirby would be the first witness called upon the resumption of hearings before the Special Master.

(b) (39) Kirby requested and obtained from his then attorneys an evaluation of his personal potential liability in the *Breswick* and *Zenn* actions, and was informed, among other things, that such liability with respect to the claims concerning the 1950 Exchange Transaction asserted in the first cause of action in *Zenn* (State) and Count II of *Zenn* (Federal), heretofore referred to in paragraph 20, would mean a loss to Kirby of $22,800,000 upon a recission of his portion of that transaction and, in addition, his liability for jointly participating with others in said transaction would be approximately $39,350,000, the cash equivalent of recission.

(c) (38) Kirby was informed that certain stockholders of Alleghany (other than the previous plaintiffs Murchison) had acquired and were accumulating [fol. 256] Alleghany shares in contemplation of a proxy contest for control of Alleghany.

43. (40) Thereupon Kirby, with the participation of Ireland, commenced negotiations with Phillips with a view:

(a) to inducing Phillips to withdraw his own opposition as well as that of the objecting plaintiffs in the *Breswick* and *Zenn* actions to the proposed settlement and to accept a separate settlement with Kirby alone of Kirby's personal liabilities on terms favorable to Kirby; and (b) to enlisting Phillips' aid in placing Kirby in a stronger position to oppose those stockholders who Kirby believed might cause a proxy contest. As a result of said negotiations, Phillips, Kirby and Ireland entered upon the joint agreement, arrangement and conspiracy hereafter described.

44. (41) In or about October, November or December, 1959, Phillips, Kirby and Ireland entered upon a conspiracy to the effect that, in return for Phillips' betrayal of his fiduciary duties to this Court, to the New York Supreme Court, to Alleghany and its stockholders and to the plain-

tiffs in the Derivative Actions and in return for his advocacy of the acceptance of a separate settlement by Kirby of Kirby's personal liability upon terms favorable to Kirby and against the corporate interest of Alleghany and IDS, Kirby would secure to Phillips the following personal benefits:

(a) A position of prominence as a director or officer of IDS, Alleghany or one of its affiliates;

(b) A substantial voice in the management and operation of IDS or Alleghany or an enterprise controlled by Alleghany or Kirby;

(c) Employment as a consultant or otherwise by IDS, Alleghany or one of its affiliates at a substantial salary;

(d) Other emoluments or benefits which are not now known to plaintiff.

45. (42) In or about December, 1959 Phillips, Kirby and Ireland, in furtherance of the basic conspiracy alleged above, further agreed and conspired:

(a) To retain separate counsel to conduct separate settlement negotiations on Kirby's behalf, without the knowledge of the attorneys of record for Kirby and Alleghany, and without the knowledge of other parties to the action outside the Phillips group;

(b) To represent to the plaintiffs in the Derivative Actions, to this Court, to the New York Supreme Court and to Alleghany that the separate Kirby settlement was of benefit to Alleghany, while concealing the personal self-interest of Phillips, Kirby and others with respect to such separate settlement;

(c) To forestall objection on the part of the Board of Directors of Alleghany to the separate Kirby settle- [fol. 257] ment by taking representation of Alle-

ghany out of the hands of then counsel of record and placing it in the hands of defendant Kirby's new counsel and Ireland;

(d) To bring on before this Court an *ex parte* application for approval of the proposed separate settlement with Kirby, secretly prepared and concealed from counsel, other than those in the Phillips group, in the pending actions;

(e) To include in the stipulation presented for approval by means of the *ex parte* application, a provision restricting Alleghany's power to part with the voting rights incident to shares of IDS voting stock then or thereafter owned by Alleghany;

(f) To attempt by such *ex parte* settlement order to obtain a release of Kirby from any obligation of contribution to his co-defendants resting upon him as a matter of law;

(g) To conceal from this Court and the state court the undisclosed considerations between Phillips and Kirby inducing the separate settlement;

(h) To conceal from the Alleghany Board of Directors, the plaintiffs and the defendants in the Derivative Actions the secret agreement or understanding between Phillips, Ireland and Kirby.

46. (43) In order to secure to Phillips the benefits promised him as an inducement to enter with Kirby the conspiracy to defraud, and in order to secure Phillips' services as a future director for Kirby's personal purposes, Phillips, Ireland and Kirby further agreed and conspired with respect to the period after the settlement had been accomplished, as follows:

(a) Kirby was to use the additional 130,000 voting shares of IDS which Alleghany was to secure from the previous plaintiffs Murchison under earlier stipula-

tions of settlement entered into by all defendants, and which, with Alleghany's IDS shares, carried voting control of IDS, to place Phillips on the Board of IDS;

(b) Kirby was to create for Phillips a position within IDS, or Alleghany, or both, which would give him a substantial voice in the affairs of both these corporations;

(c) Kirby was to cause Alleghany or IDS or a corporation controlled by either of them to create a position for Phillips which would carry substantial remuneration for Phillips.

47. (44) In December, 1959 the following overt acts were committed in carrying out the aforesaid conspiracy:

(a) Kirby and Ireland with the help of Phillips retained new counsel to represent both Alleghany and Kirby in secret negotiations for a separate settlement [fol. 258] of Kirby's liability to Alleghany, which negotiations were concealed from all parties and counsel to the action outside the Phillips group and even from Kirby's and Alleghany's then counsel of record;

(b) Phillips abandoned his opposition to any settlement in the *Zenn* and *Breswick* actions and became an advocate of the separate Kirby settlement;

(c) Kirby, Ireland and Kirby's new counsel secretly placed representation of Alleghany in the Derivative Actions in the hands of Kirby's new counsel and Ireland, without disclosure to or authority from the Board of Directors of Alleghany;

(d) Kirby caused to be drafted and Phillips and Ireland participated in drafting a separate settlement agreement whereby Kirby, among other things, in exchange for payment to Alleghany of an additional $1,100,000 was not only to be released from his obligations to the plaintiffs in the Derivative Actions and to

Alleghany but also was to be released from any obligation to contribute to or indemnify his co-defendants;

(e) Kirby, Phillips and Ireland included in this separate settlement agreement, for *ex parte* submission to this Court, a provision which would freeze control of IDS in Alleghany;

(f) Phillips, concealing from plaintiffs in the Derivative Actions the private and personal benefits which he was to secure by virtue of the settlement, induced certain of them to agree to the stipulation of settlement negotiated by Phillips, Kirby and Ireland;

(g) Kirby by his new counsel and Ireland presented to this Court for its approval on December 22, 1959 a stipulation containing, among other things, the provisions referred to in (d) and (e) above, upon less than a full day's notice thereof to counsel for the other defendants and plaintiffs, other than the Phillips group, in the Derivative Actions;

(h) Phillips, Kirby and Ireland and Kirby's new counsel, if known to such new counsel, concealed from this Court, during three days of hearings, on December 22, 23 and 24, 1959, the secret arrangements hereinabove alleged by which Phillips was to be rewarded for his advocacy of the proposed settlement, notwithstanding that the role of Phillips in connection with the settlement was material to the Court's deliberations and should have been disclosed to it. Approval by this Court of the separate Kirby settlement, after certain provisions were deleted by the Court because of the objections of Kirby's co-defendants, was given on December 24, 1959;

(i) Phillips, Kirby and Ireland, on or about December 28, 1959, concealing the fraudulent manner in which this Court's approval of the separate Kirby settlement

had been secured, obtained an order from the Supreme [fol. 259] Court of the State of New York in the *Zenn* action approving the separate Kirby settlement and providing for subsequent entry of a judgment dismissing the State Court complaint against Kirby on the merits, which judgment was obtained on February 4, 1960;

(j) Kirby's new counsel which Kirby had previously retained to represent Alleghany orally outlined to the Alleghany Board of Directors on December 29, 1959, at which meeting Kirby presided, the terms of the separate Kirby settlement as disclosed to the courts and the terms of settlements of the other defendants in the Derivative Actions, represented to the Alleghany Board that such settlements were fair to Alleghany and recommended that such settlements be approved;

(k) Neither Kirby, nor Ireland, nor Kirby's new counsel, if known to such new counsel, disclosed to the Alleghany Board the fact that Kirby had agreed to the aforesaid secret arrangements personally benefitting Phillips and Kirby;

(l) Although they were duty bound to do so, neither Kirby nor his counsel, nor Ireland presented to this Court, the New York Supreme Court or the Alleghany Board either: (i) the fact that said Robert J. Fitzsimmons, in his report as Referee to the State Court in *Zenn* (State), applied a purported provision from Alleghany's Certificate of Incorporation which was not in fact in said Certificate, and based on said purported but non-existent provision, reported that the personal interest of Kirby, Young, Anzalone and Purcell in the 1950 Exchange Transaction did not destroy the existence of a quorum at a meeting of Alleghany's Board on December 6, 1949 at which a resolution was purportedly adopted authorizing said transaction, and recommended such conclusion to the State Court; or

(ii) facts, not adduced before said Referee, required for a fair disclosure of said 1950 Exchange Transaction, and which were material to an adequate appraisal of the value of the claims against Kirby arising out of said Transaction; or (iii) the evaluation by Kirby's counsel heretofore alleged in paragraph 42;

(m) Kirby rewarded Ireland for his part in the conspiracy by causing the Alleghany Board on December 29, 1959 to elect Ireland a director of Alleghany and to vote a $30,000 bonus to Ireland for his services in connection with the settlement of the Derivative Actions, and such amount was paid to Ireland by Alleghany.

48. Kirby through Ireland and Kirby's new counsel on February 4, 1960 obtained a separate judgment dismissing the *Zenn* (State) action on the merits as to Kirby, and on June 21, 1960 obtained a further judgment in the Supreme Court, New York County, generally dismissing the *Zenn* (State) action on the merits, concealing in each instance [fol. 260] from that court the fraudulent manner in which approval of the separate Kirby settlement had been obtained.

49. The aggregate sum paid by Kirby to Alleghany in settlement of his personal liability on all claims asserted in *Zenn* (State) and *Breswick* was grossly inadequate to settle the claim against him arising out of the 1950 Exchange Transaction alone.

50. (53) After approval of the settlements by this Court and on or about April 19, 1960, Kirby alone and without consulting any of the directors of Alleghany and without consulting the Executive Committee of Alleghany, designated a slate of directors for IDS and caused Alleghany's IDS stock to be voted in favor of said slate of directors, which included Phillips as one of its members, thereby bringing about the election of such slate as the Board of Directors of IDS.

51. (56) In causing Phillips' election to the IDS Board, Kirby carried out in part his secret promise to reward Phillips for obtaining the consent of the plaintiffs in the Derivative Actions to the separate settlement on terms favorable to Kirby.

52. (57) At the time Kirby named Phillips to the IDS Board, Kirby knew or should have known:

(a) That Phillips had been a chronic litigator and in the course of several of such litigations had made wild, reckless and defamatory charges against the directors of numerous corporations (including Kirby himself), against judges of the United States District Courts and the Court of Appeals for the Fourth Circuit, as well as against justices of the Supreme Court of the United States, members of federal regulatory agencies, a relative of the then President of the United States, prominent attorneys and others;

(b) That on July 30, 1959, shortly before the formation of the conspiracy among Kirby, Phillips and Ireland, Phillips as a co-plaintiff instituted an action against the members of the Interstate Commerce Commission in the United States District Court for the District of Columbia, in which Phillips charged Kirby, *inter alia,* with fraudulently inducing the members of the Interstate Commerce Commission, by bribery and other means, to decline to investigate allegedly illegal activities of Kirby and Young in acquiring, in 1954, control of The New York Central Railroad;

(c) Of Phillips' prior endeavors to achieve election to the Boards of Directors of well-known concerns through litigation and through proxy contests, and that such efforts by Phillips had given rise to the findings, among others, concerning him:

(i) by the United States District Court for the Eastern District of Pennsylvania, that Phillips, in

[fol. 261] connection with his effort to become a director of the Pennsylvania Railroad, had "deliberately and maliciously" sent telegrams containing false and misleading statements "with an intent to intimidate" proxy holders and "knowingly, maliciously and intentionally" violated "the applicable rules of the Securities and Exchange Commission";

(ii) by the United States District Court for the Eastern District of Pennsylvania, that President Symes of the Pennsylvania Railroad had not made false and misleading statements when he informed his shareholders (a) that "it would be a tragedy to elect Phillips" a director of the Pennsylvania; and (b) that Phillips had never served as an officer of any company, never served as a director of any company and never had to meet a payroll;

(iii) by the SEC in connection with proceedings invoked by the management of the United Corporation, and Phillips' proxy contest related thereto, that

"throughout the proceedings, numerous hours were wasted by Phillips' efforts to explore irrelevant issues, unnecessary arguments and recriminations. His litigation in the courts was uniformly unsuccessful and we find that no benefit resulted therefrom, directly or collaterally. In addition, we must recognize that Phillips' activities were in large part motivated by personal motives."

53. (58) Phillips' prior activities and his reputation in the business and financial community were such as to exclude him from consideration for election as a director of IDS or any similar corporation. His election to the IDS Board was the result of his secret agreement with Kirby, and but for the secret arrangement to reward Phillips, he would never have been considered for this post.

54. (59) On April 18, 1960 the stock of IDS was quoted in the New York market at a price of $215 bid and $229 asked. On the day following, Phillips was elected a director of IDS. On April 20, 1960, after Phillips' election as a director became known, the IDS stock was quoted in the New York market at $195 bid and $196 asked. This drop in the value of IDS stock was in large part attributable to adverse public reaction to the election of Phillips as a director of IDS.

55. On or about June 22, 1960 the Alleghany nominees on the IDS Board of Directors pursuant to authorization by Kirby voted to establish a Subcommittee with the title "Finance and Law Committee" (hereafter "Subcommittee").

56. (62(d)) Although Phillips was unqualified for any such position, Kirby caused Phillips' election as chairman [fol. 262] of the Subcommittee at a salary of $2,500 per month, with Ireland and Fred M. Kirby as the other two members of the Subcommittee. Phillips drew a salary in such capacity from July 9, 1960 to June 28, 1961.

57. Kirby caused Phillips' election as chairman of the Subcommittee and the authorization of a salary of $2,500 per month as such chairman in part payment of the obligation incurred by Kirby in exchange for Phillips' services in effecting the separate Kirby settlement.

58. The secret arrangement between Phillips and Kirby and Ireland, whereby each was to be rewarded at the expense of Alleghany or IDS for breach of their respective fiduciary duties to the courts and to Alleghany in negotiating a separate settlement for Kirby, and Kirby's concealment of facts material to the existence and extent of his liability to Alleghany arising out of the 1950 Exchange Transaction, made the entire Kirby settlement a fraud on the courts to which its acceptance was recommended, on the plaintiffs in the Derivative Actions, on Kirby's co-defendants, and on Alleghany.

59. Throughout the period from the completion of the 1950 Exchange Transaction on or about May 18, 1950 to date Kirby and Ireland, in violation of their fiduciary duties, continued to conceal from the Alleghany shareholders, this Court and the New York Supreme Court both the facts and, after September, 1959, the secret arrangement, heretofore referred to in paragraph 58.

60. (45) Defendant Kirby knew or should have known that by means of the fraudulent separate settlement he was obtaining a release of his liabilities, several and joint, to Alleghany at an amount far less than that which he would have had to pay had the fraudulent action and breaches of fiduciary duties heretofore described not been committed. In particular, Kirby knew or had reason to know that by means of his concealments and fraudulent separate settlement he was obtaining a release of his joint and several liability to Alleghany arising out of the 1950 Exchange Transaction, for a small fraction of the amount for which he was liable.

61. In addition to the other consequences of the aforesaid fraud and breaches of fiduciary duties of Kirby, Ireland and Phillips heretofore alleged:

(a) Alleghany has been obliged to employ legal counsel to vindicate its rights;

(b) Alleghany may become liable to pay an amount to be fixed by this Court as reasonable attorneys fees incurred by previous plaintiffs in this litigation prior to the filing of this amended and supplemental complaint;

[fol. 263] (c) Alleghany unlawfully was caused by Kirby, Ireland and Fred M. Kirby to employ counsel, in furtherance of the personal interests of Kirby and Ireland, actively to defend this action from its inception to June 14, 1961.

62. The payments heretofore alleged in paragraph 61(c) which Kirby caused Alleghany to make on Kirby's behalf and on behalf of Ireland and others were not for the benefit of Alleghany, were in violation of its charter and by-laws and the applicable laws of New York and Maryland.

63. All of the actions complained of in paragraphs 1 through 62 originated in, took place in, or were consummated in the Southern District of New York.

64. By reason of the facts heretofore alleged in paragraphs 1 through 62 the separate Kirby settlement of his liability to Alleghany in December of 1959 was a fraud upon Alleghany, this Court, and the New York Supreme Court. The stipulations between Kirby and Alleghany, and the orders and judgments of this Court and the New York Supreme Court enabling the separate Kirby settlement, should be rescinded, vacated and declared void.

Wherefore plaintiff demands:

(a) That this Court declare null and void and rescind the stipulation of settlement dated December 24, 1959, entered into by David Teitelbaum on behalf of Kirby with Graubard & Moskovitz as representatives of objectant Rosen in *Zenn* (State) and Charles T. Ireland, Jr. on behalf of Alleghany;

(b) That this Court declare null and void so much of its order of December 24, 1959 vacating its injunctive order of October 27, 1955 and approving the separate Kirby settlement in *Breswick* as relieves Kirby of any further liability to Alleghany in that action or, in the alternative, that this Court enter an order enjoining Kirby from pleading any such order or judgment entered thereon as *res judicata* or collateral estoppel in this or any action;

(c) That this Court declare null and void so much of the order approving the separate Kirby settlement, entered

by the New York State Supreme Court in the *Zenn* action on December 28; 1959, as dismissed the complaint on behalf of Alleghany against Kirby or, in the alternative, that this Court enter an order enjoining Kirby from pleading any such order or judgment entered thereon as *res judicata* or collateral estoppel in this or any action;

(d) That this Court declare null and void so much of the judgment of the New York State Supreme Court entered February 4, 1960 as dismisses the *Zenn* complaint on behalf of Alleghany on the merits with respect to Kirby, or, in [fol. 264] the alternative, that this Court enter an order enjoining Kirby from pleading any such judgment as *res judicata* or collateral estoppel in any action;

(e) That this Court declare null and void the judgment of the New York State Supreme Court of June 21, 1960, insofar as it approved dismissal of the *Zenn* action as to Kirby, or, in the alternative, that this Court enter an order enjoining Kirby from pleading any such judgment as *res judicata* or collateral estoppel in this or any subsequent action;

(f) That this Court declare null and void and rescind any and all releases on behalf of Alleghany delivered to Kirby in either the *Breswick* or the *Zenn* actions;

(g) That in the event this Court grants the relief sought under (a) through (f) above, this Court rescind the 1950 Exchange Transaction or award against Kirby and in favor of Alleghany damages measured by the value of a rescission of said transaction, or in the alternative, order the filing in this action of an amended complaint by Alleghany based upon said 1950 Exchange Transaction and further order a prompt trial thereon or, in the further alternative, grant such other further and different relief as may then be just and proper in the premises;

(h) That this Court direct Kirby, Phillips and Ireland to account to Alleghany for all moneys, profits and benefits

received by them or any of them as a result of the secret agreement and conspiracy alleged in this complaint;

(i) That this Court direct Kirby, Ireland and Fred M. Kirby to reimburse Alleghany for legal fees and expenses incurred by it in actively defending this action from September 8, 1960, to June 14, 1961;

(j) That this Court render judgment in favor of Alleghany and against Kirby, Ireland and Phillips in such amount as may be ordered or adjudged against Alleghany with respect to plaintiffs' attorneys fees herein incurred on its behalf prior to the date of the filing of this amended and supplemental complaint;

(k) That this Court award to Alleghany the costs and disbursements of this action;

(l) That this Court grant to Alleghany such other, further and different relief as may be just and proper in the premises.

Townley, Updike, Carter & Rodgers, Attorneys for Plaintiff, Office & P. O. Address: 220 East 42nd Street, New York 17, New York, By J. H. Carter, A Member of the Firm.

[fol. 264a] Acknowledgment of service (omitted in printing).

[fol. 265]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 60-3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND JR., and FRED M. KIRBY, Defendants.

ANSWER OF DEFENDANT CHARLES T. IRELAND JR. TO AMENDED AND SUPPLEMENTAL COMPLAINT—Filed December 31, 1962

The defendant, Charles T. Ireland, Jr., by his attorneys, for his answer to the Amended and Supplemental Complaint (hereinafter "Complaint"):

1. Admits the allegations of paragraphs 1, 2, 3, 7, 9, 10, 11, 13, 14, 15, 16, 17, 18 and 34 of the Complaint.

2. Denies the allegations of paragraphs 12, 21, 25, 26, 27, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 56, 57, 58, 59, 60, 61, 62, 63 and 64 of the Complaint.

3. Admits on information and belief the allegations of paragraph 4 of the Complaint.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5 of the Complaint except admits upon information and belief that defendant Allan P. Kirby (hereinafter "Kirby") is a resident and citizen of the State of New Jersey, that Kirby owns beneficially or controls in excess of 3,250,000 [fol. 266] shares of Alleghany common stock and that he is the largest shareholder of Alleghany common stock.

[File endorsement omitted]

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 6 of the Complaint except admits that on or about September 8, 1960 defendant Kirby owned 516,500 shares of Alleghany common stock and that on December 31, 1959 there were 5,291,377 shares of such stock outstanding.

6. Denies the allegations of paragraph 8 of the Complaint except admits that from January 1, 1949 until January 25, 1958 Robert R. Young was Chairman of the Board of Alleghany Corporation (hereinafter "Alleghany") and exercised the duties and powers of that office as set forth in the Charter and By-laws of Alleghany, and that from January 1, 1949 to January 9, 1961 Kirby was President of Alleghany and from January 29, 1958 to May 23, 1961 Chairman of the Board of Alleghany and during those times Kirby exercised the duties and powers of the offices he held as set forth in the Charter and By-laws of Alleghany.

7. Denies the allegations of paragraph 19 of the Complaint and refers the Court to the complaints in the respective derivative actions for an accurate statement of their contents.

8. Denies the allegations of paragraph 20 of the Complaint and refers the Court to the complaints in *Zenn* v. *Anzalone* (S.D.N.Y. Civil Action No. 92-205) (hereinafter [fol. 267] *"Zenn* (Federal)") and *Zenn* v. *Anzalone* (Sup. Ct. N.Y. Co. Index No. 7244/1954) (hereinafter *"Zenn* (State)") for an accurate statement of their contents.

9. Denies the allegations of paragraph 22 of the Complaint, except admits that an action entitled *Breswick & Co., et al.,* v. *United States* (S.D.N.Y. Civil Action No. 101-114) was commenced in 1955 and refers the Court to the complaint in that action for an accurate statement of its contents.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 23

of the Complaint, except admits, upon information and belief, that defendant Phillips was one of the plaintiffs in *Breswick* v. *United States,* that he acted as consultant to counsel for plaintiffs in *Breswick & Co., et al.,* v. *Briggs, et al.* (S.D.N.Y. Civ. Action No. 98-371), that he acted as consultant to an attorney for the objectant Samuel R. Rosen in *Zenn* (State), and that he appeared as a witness in *Breswick* v. *Briggs.*

11. Denies the allegations of paragraph 24 of the Complaint, except admits that on occasions between 1939 and 1955 Phillips was employed or retained by Alleghany, that in connection with one such retainer Phillips rendered services incident to the solicitation of proxies on behalf of Alleghany in connection with a stockholders' meeting of the New York Central Railroad Company in 1954, that on [fol. 268] or about September 30, 1954, the then current retainer of Phillips by Alleghany terminated, that the actions *Breswick* v. *United States, Zenn* (State), *Zenn* (Federal), and *Breswick* v. *Briggs* were commenced, respectively, on June 6, 1955 in 1954, in 1954, and on or about February 14, 1955, and defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in sub-paragraphs 24(e) and (f) of the Complaint.

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 28 of the Complaint, except admits that *Breswick* v. *United States* was the subject of a number of decisions in various United States courts which were reported as *Breswick & Co.* v. *United States,* 134 F. Supp. 132 (1955); *Breswick & Co.* v. *United States,* 138 F. Supp. 123 (1956); *Alleghany Corp.* v. *Breswick & Co.,* 353 U.S. 151 (1957); *Alleghany Corp.* v. *Breswick & Co.,* 355 U.S. 415 (1958); *Breswick & Co.* v. *United States,* 156 F. Supp. 227 (1959); and *Breswick & Co.* v. *United States,* 160 F. Supp. 754 (1958); and that the latter decision dismissed the action on the merits.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 29 of the Complaint, except admits that Kirby served an answer in *Zenn* (Federal) on or about November 18, 1954.

14. Denies knowledge or information sufficient to form [fol. 269] a belief as to the truth of the allegations of paragraph 30 of the Complaint that defendant Kirby joined in the proposed settlement and was one of its proponents in the State Court and except as so denied admits the allegations of paragraph 30 of the Complaint.

15. Denies the allegations of paragraph 31 of the Complaint except admits that this Court entered an order on October 27, 1955 in *Breswick* v. *Briggs* and refers the Court to such order for a complete and accurate statement of its provisions.

16. Denies the allegations of paragraph 32 of the Complaint except admits that on September 11, 1956 the defendants in *Breswick* v. *Briggs* supplemented their motion to vacate the order of this Court of October 27, 1955, originally made in March, 1956, on the ground *inter alia* that the order had been improvidently made, on the further ground that because they had conducted settlement negotiations with the plaintiffs in *Breswick* v. *Briggs* since the entry of the order of October 27, 1955 and since such negotiations resulted in offers in excess of the offer accepted by the general counsel for plaintiffs in *Zenn* (State), the reason for the entry of the order no longer existed.

17. Denies the allegations of paragraph 33 of the Complaint except admits that this Court entered an order on October 3, 1956 in *Breswick* v. *Briggs* and refers the Court to such order for a complete and accurate statement of its provisions.

[fol. 270] 18. Denies the allegations of Paragraph 35 of the Complaint except admits that during the course of the hearings before the Referee in *Zenn* (State), requests

were made that Kirby appear for the purpose of giving testimony.

19. Denies the allegations of paragraph 36 of the Complaint except admits that Kirby never testified before the Referee in *Zenn* (State).

20. Denies the allegations of paragraph 37 of the Complaint except admits that the Referee and Special Master rendered his respective reports to both the State and Federal Courts on November 17, 1958 and that the Referee's report, in substance, recommended judicial approval of the proposed settlement.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 41 of the Complaint except admits that this Court, on September 22, 1959 remitted the settlement proposal to the Special Master for additional consideration and refers the Court to the order of September 22, 1959 for a complete and accurate statement of its provisions.

22. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 52 of the Complaint.

23. Denies the allegations of paragraph 54 of the Complaint except admits that on April 18, 1960 the stock of IDS was quoted over-the-counter at a price of $215.00 bid [fol. 271] and $229.00 asked, that on April 19, 1960 Phillips was elected a Director of IDS and that on April 20, 1960 the stock of IDS was quoted over-the-counter at $185.00 bid and $201.00 asked.

24. Denies the allegations of paragraph 55 of the Complaint except admits that on June 22, 1960 the IDS Board of Directors appointed a Subcommittee with the title "Finance and Law Committee".

First Affirmative Defense

25. The Complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

26. This Court lacks jurisdiction over the subject matter of this action.

Third Affirmative Defense

27. This Court does not have jurisdiction of this action upon the ground of diversity of citizenship because as is admitted in paragraph 1 of the Complaint, plaintiff Alleghany's principal place of business is at 350 Park Avenue, New York, New York thereby making it a citizen of the State of New York and as is admitted in paragraphs 9 and 10 of the Complaint respectively, defendant Phillips and this defendant are also citizens of the State of New York. Moreover, this Court has no inherent jurisdiction of this action nor does it have jurisdiction upon any other ground.

[fol. 272] Fourth Affirmative Defense

28. This Court lacks jurisdiction of this action by reason of the fact that parties indispensable to its determination have not been joined.

Fifth Affirmative Defense

29. Although this action purports to be brought as an action in equity, this action has not been brought, has not been prosecuted and is not being prosecuted in good faith.

Sixth Affirmative Defense

30. The plaintiff, and each and every shareholder of Alleghany, is barred both by laches and by estoppel from prosecuting this or any other action purporting to base any claim or cause of action upon the claim sought to be alleged in the Complaint herein by reason of the facts:

(a) that each and every stockholder of Alleghany of record on August 23, 1955 had actual notice, and each stockholder becoming such of record subsequent to August 23,

1955 and prior to June 21, 1960 had constructive notice, of the proposed settlement in *Zenn* (State) and of his right to appear and participate in all proceedings related thereto;

(b) the annual report of Alleghany mailed each year to each stockholder of record advised each stockholder of the pendency of the proposed stipulation of settlement executed [fol. 273] in 1955 and the developments over the years with respect thereto:

(i) The Annual Report for the year 1955 described *Zenn* (State), referred to the additional derivative actions pending, reported negotiations for settlement culminating in a stipulation of settlement providing for payment of $700,000 cash plus certain revisions of existing guaranteed joint venture agreements, and informed shareholders of the hearings before the Referee in *Zenn* (State), and that consideration of the evidence was in the hands of the Referee.

(ii) The Annual Report for the year 1956 referred the stockholders to a letter to stockholders dated December 6, 1956, which discussed the history of *Breswick & Co.* v. *United States,* and advised each stockholder that another copy of such letter would be sent on request.

(iii) The Annual Report for the year 1957 reported that in "the corporate derivative law suits, an offer of settlement which your management believes to be fair and in the best interest of the Corporation is in the hands of a court appointed referee . . ."

(iv) The Alleghany Report for 1958 advised each stockholder that the Referee in *Zenn* (State) had reported on November 17, 1958 that the Basic Settlement was in his opinion "a fair, reasonable, and adequate [fol. 274] basis for a settlement of this litigation and is worthy of judicial approval. In my considered judg-

ment, it would be for the best interest of Alleghany and its stockholders to have this substantial settlement judicially approved"; and such Annual Report further advised each stockholder that the offer was awaiting final judicial approval.

(v) The Alleghany Report for the year 1959 advised of the settlement of the so-called "corporate derivative suits" on December 29, 1959, involving receipt by Alleghany of $3,000,000 in cash and 130,000 shares of the voting stock of IDS in exchange for a like number of non-voting shares.

(c) Responsive to the notice of hearings of August 23, 1955 and/or the information contained in the annual and other reports, all stockholders who desired to be heard appeared in person or by counsel and participated in the various proceedings before the Courts, the Referee in *Zenn* (State), and the Special Master in *Breswick* v. *Briggs*. Notice of entry of the Judgment of June 21, 1960 in *Zenn* (State), for example, was served on nearly thirty law firms who had appeared for various stockholders.

(d) The election of the Board of Directors of IDS occurred on April 19, 1960, and the names of the individuals elected were widely publicized, and were known or in the [fol. 275] exercise of due diligence could have been known to every interested Alleghany shareholder.

(e) On May 13, 1960, in reliance upon the fact that the judicially approved settlement had been fully consummated, Alleghany executed and on or about such date delivered to each alleged joint tortfeasor in *Zenn* (State) the general and unconditional releases described in Paragraph 32 of this Answer.

(f) The Court in *Zenn* (State), in its final judgment entered June 21, 1960, dismissing that action with prejudice as to all defendants, found, among other findings,

(i) that the payments and the transfer and exchange of stock had been consummated as provided in the Order approving the settlement;

(ii) "that within the contemplation of paragraph 12A of the aforesaid Order of December 29, 1959 nominees of Alleghany Corporation's designation were elected as directors of IDS on April 19, 1960";

(iii) that the general releases described in paragraph 32 of this Answer had been executed and delivered; and

(iv) "that all actions to be taken pursuant to the stipulations of settlement made herein and the aforesaid Orders of December 28 and December 29, 1959, prior to and as conditions for the entry of final judgment have been taken."

[fol. 276] (g) Due notice of entry of such order was served upon all counsel who had appeared for stockholders;

(h) An attempted appeal therefrom by an individual stockholder has been dismissed, and the aforesaid judgment of June 21, 1960, and each finding therein, is in full force and effect.

(i) Neither the plaintiff herein, nor any stockholder of Alleghany, did between April 19, 1960 and May 13, 1960, or between the latter date and June 21, 1960, or after June 21, 1960, bring any proceeding in *Zenn* (State) attacking in any manner the settlement approved therein, or the findings, order, and judgments made and entered therein.

Seventh Affirmative Defense

31. This action seeks to set aside only those portions of the orders, judgments and releases incident to the settlement of *Zenn* (State) and *Breswick* v. *Briggs* which relate to defendant Allan P. Kirby. At the same time,

plaintiff seeks to preserve the remaining portion of such documents to release the other defendants in the *Zenn* (State) and *Breswick* v. *Briggs*. Such a piecemeal attack on the interdependent proceedings, orders, judgments, releases and other documents incident to and consummating the settlement of these actions cannot be maintained.

[fol. 277] Eighth Affirmative Defense

32. Further prosecution of *Zenn* (State) or of *Breswick* v. *Briggs*, or of any purported derivative action by Alleghany or by any stockholder of Alleghany seeking relief based upon any of the matters and facts alleged, referred to or embraced in the Consolidated Amended Complaint served in *Zenn* (State) (which Consolidated Amended Complaint included all causes of action sought to be alleged in the amended complaint served in *Breswick* v. *Briggs*), or arising in any way out of the facts or transactions therein referred to, is barred by reason of the facts that:

(a) On May 13, 1960 Alleghany, by and through its duly authorized Executive Vice-President, executed, and on or about such date delivered, to each of the alleged joint tortfeasors in *Zenn* (State) a full, general, and unconditional release of any and all such claims;

(b) on the 21st day of June, 1960, in *Zenn* (State), the Court entered its final judgment finding and reciting that such general releases had, in accordance with the Court's order of December 29, 1959, been delivered to each of the persons named in the stipulated form of release, which listing included all alleged joint tortfeasors;

(c) based upon such finding and the additional findings of full performance of the several stipulations of settlement, the Court in the June 21, 1960 judgment in *Zenn* [fol. 278] (State) dismissed the action with prejudice as to all defendants;

(d) each of such general and unconditional releases presently is valid, binding and effective; and

(e) The legal effect of the execution and delivery of such general and unconditional releases to one or more alleged joint tortfeasors is to release each alleged joint tortfeasor as to each and all of the claims sought to be alleged in *Zenn* (State) and *Breswick* v. *Briggs*.

Ninth Affirmative Defense

33. To the extent that the Complaint herein seeks to litigate claims encompassed within the Consolidated Amended Complaint in *Zenn* (State), and in particular, the claims asserted or which might have been asserted with respect to the facts alleged in the first count of *Zenn* (State), this action is barred by reason of the fact that a final judgment was entered in *Zenn* (State) on June 21, 1960, which judgment is in full force and effect and the matters which were determined, adjudged and decreed therein were and are *res adjudicata* herein.

Wherefore, defendant Charles T. Ireland, Jr. prays respectfully a judgment dismissing the Amended and Supplemental Complaint herein with the costs and disbursements of this action.

Kissam & Halpin, By James H. Halpin, A Member of the Firm, Attorneys for Defendant Charles T. Ireland, Jr., 120 Broadway, New York 5, N. Y.

[fol. 281]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 60-3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR. and FRED M. KIRBY, Defendants.

ANSWER OF DEFENDENT ALLAN P. KIRBY TO AMENDED AND SUPPLEMENTAL COMPLAINT—Filed December 31, 1962

The defendant, Allan P. Kirby (hereinafter "Kirby"), by his attorneys, for his answer to the Amended and Supplemental Complaint (hereinafter "Complaint"):

1. Admits the allegations of paragraphs 1, 2, 3, 7, 9, 10, 11, 13, 14, 15, 16, 17, 18, and 34 of the Complaint.

2. Denies the allegations of paragraphs 12, 21, 26, 27, 38, 39, 40, 42, 43, 44, 45, 46, 47, 49, 51, 53, 57, 58, 59, 60, 61, 62, 63, and 64 of the Complaint, and on information and belief, the allegations of paragraph 25 of the Complaint.

3. Admits, on information and belief, the allegations of paragraphs 4 and 5 of the Complaint.

4. Admits that from prior to January 1, 1949 and continuing through May 23, 1961 Kirby owned or controlled a substantial quantity of shares of Alleghany Common Stock, and except as so admitted denies the allegations of paragraph 6 of the Complaint.

5. Admits that, during the period from January 1, 1949 until his death on January 25, 1958, Robert R. Young (hereinafter "Young") was Chairman of the Board of Al-

[File endorsement omitted]

leghany Corporation (hereinafter "Alleghany") and exercised the duties and powers of that office as set forth in [fol. 282] the Charter and By-Laws of Alleghany, and that from January 1, 1949 to January 9, 1961 Kirby was President of Alleghany and from January 29, 1958 to May 23, 1961 Chairman of the Board of Alleghany and during those times exercised the duties and powers of the office he held as set forth in the Charter and By-Laws of Alleghany, and except as so admitted denies the allegations of paragraph 8 of the Complaint.

6. Admits that pleadings, motions, findings, opinions, reports, orders, and judgments were filed and made from time to time in the actions referred to in paragraphs 19, 20, 22, 31, 32, 33, 37, 41, and 48 of the Complaint, refers to such pleadings, motions, findings, opinions, reports, orders and judgments for the terms thereof, and except as so admitted denies the allegations of paragraphs 19, 20, 22, 31, 32, 33, 37, 41, and 48 of the Complaint.

7. Admits that Randolph Phillips ("Phillips") was one of the plaintiffs in *Breswick and Co., et al.* v. *United States* (S.D.N.Y. Civ. Action 101-114, hereinafter "*Breswick* v. *United States*"), and admits on information and belief that during some period or periods of time Phillips was a consultant to counsel for plaintiffs in *Breswick and Co., et al.* v. *Briggs, et al.* (S.D.N.Y. Civ. Action 98-371, hereinafter "*Breswick* v. *Briggs*"), and to counsel for objectant Rosen in *Zenn, et al.* v. *Anzalone, et al.* (Sup. Ct. N.Y. Co. Index No. 7244/1954, hereinafter "*Zenn* State"), that on occasions between 1939 and 1955 Phillips was employed or retained by Alleghany, that in connection with one such retainer Phillips rendered services incident to the solicitation of proxies on behalf of Alleghany in connection with a stockholders' meeting of the New York Central Railroad [fol. 283] Company in 1954, that on or about September 30, 1954 the then current retainer of Phillips by Alleghany terminated, that the actions *Breswick* v. *United States,*

Zenn State, *Zenn, et al.* v. *Anzalone, et al.* (S.D.N.Y. Civ. Action No. 92-205, hereinafter "*Zenn* Federal"), and *Breswick* v. *Briggs* were commenced respectively on June 6, 1955, in 1954, in 1954, and on or about February 14, 1955, denies knowledge or information sufficient to form a belief as to the truth of the allegations in subparagraphs 24(e) and (f) of the Complaint, and except as so admitted denies the allegations of paragraphs 23 and 24 of the Complaint.

8. Admits that *Breswick* v. *United States* was the subject of a number of decisions in various United States courts, more fully set out in reported decisions to which reference is made for their contents, being *Breswick & Co.* v. *United States,* 134 F. Supp. 132 (1955); *Breswick & Co.* v. *United States,* 138 F. Supp. 123 (1956), *Alleghany Corporation* v. *Breswick & Co.,* 353 U.S. 151 (1957), *Alleghany Corp.* v. *Breswick & Co.,* 355 U.S. 415 (1958), *Breswick & Co.* v. *United States,* 156 F. Supp. 227 (1957), and *Breswick & Co.* v. *United States,* 160 F. Supp. 754 (1958), that such action was dismissed on the merits, and except as so admitted denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 28 of the Complaint.

9. Admits that Kirby was never served with summons in *Zenn* State and never filed an answer therein, that defendant Kirby did serve an answer in *Zenn* Federal on November 18, 1954, and except as so admitted denies the allegations of paragraph 29 of the Complaint.

[fol. 284] 10. Admits, on information and belief, that during April of 1955, at a settlement conference participated in by Abraham Pomerantz and William E. Haudek, general counsel for the plaintiffs in *Zenn* State, and in *Zenn* Federal, Thomas F. Daly, of Lord, Day and Lord, representing the defendant Young, and Donald H. Carter, representing the Murchison defendants, with David W. Wallace, a representative of Alleghany Corporation, present, the parties agreed upon terms for settlement of all

derivative actions then pending, that such settlement agreement was reduced to writing and executed under date of July 25, 1955 subject to the approval of the court as to its fairness and adequacy, that the cash amount of such settlement was $700,000, that on July 28, 1955 Alleghany moved in the State Court for approval of such settlement; that on August 18, 1955 Robert J. Fitzsimmons, Esq. of New York, N.Y. was appointed by the State Court as Referee to inquire into the fairness, reasonableness, and adequacy of such stipulation of settlement after giving due and proper notice to all stockholders of Alleghany Corporation, that notice of such hearings before the Referee was duly given to all shareholders by mail on August 23, 1955, that during the period from September 19, 1955 through January 20, 1956, the Referee, on some 35 days of hearings, heard 7 witnesses called by the proponents, 11 by the objectants, resulting in a transcript of some 4,600 pages and the consideration of some 480 exhibits, that David W. Wallace signed the proposed stipulation of settlement as attorney-in-fact for Allan P. Kirby, and except as so admitted denies the allegations of paragraph 30 of the Complaint.

11. Admits that during the course of hearings referred to in paragraph 35 of the Complaint requests were made that the Referee direct that Mr. Kirby appear for the purpose of giving testimony, and except as so admitted denies the allegations of paragraph 35 of the Complaint.

[fol. 285] 12. Admits that Kirby never testified before the Referee appointed by the court in the *Zenn* State action, and except as so admitted denies the allegations of paragraph 36 of the Complaint.

13. Admits that on April 19, 1960, at the regularly convened annual meeting of the stockholders of Investors Diversified Services, Inc. (hereinafter "IDS"), a majority of all of the outstanding shares of voting common stock

of IDS (which majority included the stock owned by Alleghany) was voted in favor of a slate of nominees for directors, that the defendant Phillips was one of the nominees, that the nominees on such slate were duly elected as the Board of Directors of IDS, and except as so admitted denies the allegations of paragraph 50 of the Complaint.

14. Admits on information and belief that a decision in a civil action entitled *Gaudiosi* v. *Franklin* is reported at 166 F. Supp. 353, that a decision by the Securities and Exchange Commission captioned *In the Matter of United Corporation* is reported at 37 SEC 187, that a complaint was filed in the United States District Court for the District of Columbia in a civil action entitled *Myron Neisloss and Randolph Phillips* v. *Anthony S. Arpaia, et al.*, Civ. Action 2086-59, refers to the aforesaid decisions and complaint for the terms thereof, and except as so admitted denies the allegations of paragraph 52 of the Complaint.

15. Admits that the stock of IDS is not listed upon any national stock exchange but is quoted over-the-counter, that on April 18, 1960 the reported prices quoted were 215 bid and 229 asked, that on April 20, 1960 the reported prices were 185 bid and 201 asked, and except as so admitted denies the allegations of paragraph 54 of the Complaint.

[fol. 286] 16. Admits that on June 22, 1960 the Board of Directors of IDS appointed a Finance and Law Committee comprised of Fred M. Kirby, Charles T. Ireland, Jr., Randolph Phillips and the President of IDS ex officio, that the only member of the Board of Directors of IDS who voted against the appointment of such committee was John D. Murchison, that Phillips was subsequently elected Chairman of said Committee at a salary of $2,500 per month, denies knowledge or information sufficient to form a belief as to the period during which Phillips drew such salary, and except as so admitted denies the allegations of paragraphs 55 and 56 of the Complaint.

First Affirmative Defense

17. The Complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

18. This Court lacks jurisdiction over the subject matter of this action.

Third Affirmative Defense

19. This Court does not have jurisdiction of this action either upon the ground of diversity of citizenship or upon this Court's inherent jurisdiction or upon any other ground.

Fourth Affirmative Defense

20. The Court lacks jurisdiction of this action for the reason that parties indispensable to a determination of the action have not been joined in the Complaint.

Fifth Affirmative Defense

21. Although this action purports to be brought as an action in equity, this action has not been brought, has not been prosecuted, and is not being prosecuted in good faith.

[fol. 287] Sixth Affirmative Defense

22. The plaintiff, and each and every shareholder of Alleghany, is barred both by laches and by estopped from prosecuting this or any other action purporting to base any claim or cause of action upon the claim sought to be alleged in the Complaint herein by reason of the facts:

(a) that each and every stockholder of Alleghany of record on August 23, 1955 had actual notice, and each stockholder becoming such of record subsequent to August 23, 1955 and prior to June 21, 1960 had constructive notice, of the proposed settlement in the *Zenn* State action and of

his right to appear and participate in all proceedings related thereto;

(b) the annual report of Alleghany mailed each year to each stockholder of record advised each stockholder of the pendency of the proposed stipulation of settlement executed in 1955 and the developments over the years with respect thereto:

(i) The Annual Report for the year 1955 described the *Zenn* State action, referred to the additional derivative actions pending, reported negotiations for settlement culminating in a stipulation of settlement providing for payment of $700,000 cash plus certain revisions of existing guaranteed joint venture agreements, and informed shareholders of the hearings before the Referee in the *Zenn* State action, and that consideration of the evidence was in the hands of the Referee.

(ii) The Annual Report for the year 1956 referred the stockholders to a letter to stockholders dated December 6, 1956, which discussed the history of the *Breswick & Co.* v. *United States* action, and advised each stockholder that another copy of such letter would be sent on request.

(iii) The Annual Report for the year 1957 reported that in "the corporate derivative lawsuits, an offer of settlement which your management believes to be fair and in the best interest of the Corporation is in the hands of a court appointed referee . . ."

(iv) The Alleghany Report for 1958 advised each stockholder that the Referee in the *Zenn* State action had reported on November 17, 1958 that the Basic [fol. 288] Settlement was in his opinion "a fair, reasonable, and adequate basis for a settlement of this litigation and is worthy of judicial approval. In my considered judgment, it would be for the best interest of

Alleghany and its stockholders to have this substantial settlement judicially approved"; and such Annual Report further advised each stockholder that the offer was awaiting final judicial approval.

(v) The Alleghany Report for the year 1959 advised of the settlement of the so-called "corporate derivative suits" on December 29, 1959, involving receipt by Alleghany of $3,000,000 in cash and 130,000 shares of the voting stock of IDS in exchange for a like number of non-voting shares.

(c) Responsive to the notice of hearings of August 23, 1955 and/or the information contained in the annual and other reports, all stockholders who desired to be heard appeared in person or by counsel and participated in the various proceedings before the Courts, the Referee in the *Zenn* State action, and the Special Master in the *Breswick* v. *Briggs* action. Notice of entry of the Judgment of June 21, 1960 in the *Zenn* State action, for example, was served on nearly thirty law firms who had appeared for various stockholders.

(d) The election of the Board of Directors of IDS occurred on April 19, 1960, and the names of the individuals elected were widely publicized, and were known or in the exercise of due diligence could have been known to every interested Alleghany shareholder.

(e) On May 13, 1960, in reliance upon the fact that the judicially approved settlement had been fully consummated, Alleghany executed and on or about such date delivered to each alleged joint tortfeasor in the *Zenn* State action the general and unconditional releases described in Paragraph 24 of this Answer.

[fol. 289] (f) The Court in the *Zenn* State action, in its final judgment entered June 21, 1960, dismissing that action with prejudice as to all defendants, found, among other findings:

(i) that the payments and the transfer and exchange of stock had been consummated as provided in the Order approving the settlement;

(ii) "that within the contemplation of paragraph 12A of the aforesaid Order of December 29, 1959 nominees of Alleghany Corporation's designation were elected as directors of IDS on April 19, 1960";

(iii) that the general releases described in paragraph 24 of this Answer had been executed and delivered; and

(iv) "that all actions to be taken pursuant to the stipulations of settlement made herein and the aforesaid Orders of December 28 and December 29, 1959, prior to and as conditions for the entry of final judgment have been taken."

(g) Due notice of entry of such order was served upon all counsel who had appeared for stockholders;

(h) An attempted appeal therefrom by an individual stockholder has been dismissed, and the aforesaid judgment of June 21, 1960, and each finding therein, is in full force and effect.

(i) Neither the plaintiff herein, nor any stockholder of Alleghany, did between April 19, 1960 and May 13, 1960, or between the latter date and June 21, 1960, or after June 21, 1960, bring any proceeding in the *Zenn* State action attacking in any manner the settlement approved therein, or the findings, orders, and judgments made and entered therein.

[fol. 290] Seventh Affirmative Defense

23. This action seeks to set aside only those portions of the orders, judgments, and releases incident to the settlement of the *Zenn* State and the *Breswick* v. *Briggs* actions which relate to defendant Allan P. Kirby. At the

same time, plaintiff seeks to preserve the remaining portion of such documents to release the other defendants in the *Zenn* State and the *Breswick* v. *Briggs* actions. An action seeking to level such a piecemeal attack on the interdependent proceedings, orders, judgments, releases, and other documents incident to and consummating the settlement of these actions cannot be maintained.

Eighth Affirmative Defense

24. Further prosecution of the *Zenn* State action, or of the *Breswick* v. *Briggs* action, or of any purported action by Alleghany or derivative action by any stockholder of Alleghany seeking relief based upon any of the matters and things alleged, referred to or embraced in the consolidated amended complaint served in the *Zenn* State action (which consolidated amended complaint included all causes of action sought to be alleged in the amended complaint served in the *Breswick* v. *Briggs* action), or arising in any way out of the facts or transactions therein referred to, is barred by reason of the facts that:

(a) On May 13, 1960 Alleghany, by and through its duly authorized executive vice president, executed, and on or about such date delivered to each of the alleged joint tortfeasors in the *Zenn* State action a full, general, and unconditional release of any and all such claims;

[fol. 291] (b) on the 21st day of June, 1960, in the *Zenn* State action, the Court entered its final judgment finding and reciting that such general releases had, in accordance with the Court's order of December 29, 1959, been delivered to each of the persons named in the stipulated form of release, which listing included all alleged joint tortfeasors;

(c) based upon such finding and the additional findings of full performance of the several stipulations of settlement, the Court in the June 21st, 1960 judgment in the *Zenn* State action dismissed the action with prejudice as to all defendants;

(d) each of such general and unconditional releases presently is valid, binding, and effective; and

(e) the legal effect of the execution and delivery of such general and unconditional releases to one or more alleged joint tortfeasors is to release each alleged joint tortfeasor as to each and all of the claims sought to be alleged in the *Zenn* State action and the *Breswick* v. *Briggs* action.

Ninth Affirmative Defense

25. To the extent that the Complaint herein seeks to litigate claims encompassed within the Consolidated Amended Complaint in *Zenn* State, and in particular, the claims asserted or which might have been asserted with respect to the facts alleged in the first count of *Zenn* State, this action is barred by the doctrine of *res adjudicata* by reason of the fact that final judgment with respect to such claims has been entered in *Zenn* State, and said judgment is still in full force and effect.

Tenth Affirmative Defense and Counterclaim

26. For all of the reasons heretofore pleaded in this [fol. 292] answer, the instant action is without merit and plaintiff's Complaint should be dismissed. Solely in the alternative, and in the event this Court shall grant to plaintiff any part of the relief herein sought, this defendant as a counterclaim avers:

(a) The Supplemental Stipulation of Settlement entered into on December 24, 1959 by this defendant, and by counsel for Alleghany and by counsel for objectant Rosen in the *Zenn* State action provided specifically, in Paragraph 11 thereof, that "if for any . . . reason" an Order or Judgment approving such Stipulation "should be set aside, then and in" such event the "Supplemental Stipulation of Settlement shall be and become null and void and of no further force and effect, and Alleghany Corporation shall promptly repay to defendant Kirby all payments theretofore made by him pursuant to this stipulation."

(b) The order of the court in the *Zenn* State action duly made and entered on the 28th day of December, 1959, approved such Supplemental Stipulation and provided for payment in accordance with the terms of such Supplemental Stipulation.

(c) Pursuant to such Order and the terms of such Supplemental Stipulation the defendant Kirby has paid to Alleghany Corporation in excess of $1,100,000 in cash.

(d) In the event that this Court shall grant plaintiff's prayers that the orders and judgments in the *Zenn* State action and *Breswick* v. *Briggs* action be set aside or be otherwise impaired, Alleghany by the contractual terms of said Supplemental Stipulation of Settlement is bound and obligated to refund to this defendant forthwith the full amount which this defendant has paid in accordance with such stipulation.

[fol. 293] Wherefore, on the foregoing Answer this defendant respectfully prays:

(a) judgment dismissing the Amended and Supplemental Complaint herein with the costs and disbursements of this action; or in the alternative,

(b) judgment over and against Alleghany for the sum of $1,100,000 paid to it pursuant to the terms of the Supplemental Stipulation and such additional amount as the defendant Kirby contributed to the $1,000,000 paid to Alleghany in the settlement of the *Zenn* State action.

Donovan Leisure Newton & Irvine, By Robert M. Loeffler, A Member of the Firm, Attorneys for Defendant Allan P. Kirby, Office and P.O. Address, 2 Wall Street, New York 5, New York.

[fol. 293a] Acknowledgment of service (omitted in printing).

[fol. 294]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 60-3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR. and FRED M. KIRBY, Defendants.

ANSWER OF DEFENDANT FRED M. KIRBY TO AMENDED AND SUPPLEMENTAL COMPLAINT—Filed December 31, 1962

The defendant, Fred M. Kirby, by his attorneys, for his answer to the Amended and Supplemental Complaint (hereinafter "Complaint"):

1. Admits the allegations of paragraphs 1, 2, 3, 7, 9, 10, 11 and 13 of the Complaint.

2. Denies the allegations of paragraphs 12, 26, 27, 38, 39, 40, 49, 51, 53, 57, 58, 59, 60, 61, 62, 63 and 64 of the Complaint.

3. Admits, on information and belief, the allegations of paragraphs 4, 5, 14, 15, 16, 17, 18 and 34 of the Complaint.

4. Denies, upon information and belief, the allegations of paragraphs 21, 25, 43, 44, 45, 46 and 47 of the Complaint.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 35 and 42 of the Complaint.

6. Admits, on information and belief, that from prior to January 1, 1949 and continuing through May 23, 1961

[File endorsement omitted]

Allan P. Kirby owned or controlled a substantial quantity of shares of Alleghany Common Stock and, except as so [fol. 295] admitted, denies, on information and belief, the allegations of paragraph 6 of the Complaint.

7. Admits, on information and belief, that during the period from January 1, 1949 until his death on January 25, 1958 Robert R. Young (hereinafter "Young") was Chairman of the Board of Alleghany Corporation (hereinafter "Alleghany") and exercised the duties and powers of that office as set forth in the Charter and By-Laws of Alleghany, and that from January 1, 1949 to January 9, 1961 Allan P. Kirby was President of Alleghany and from January 29, 1958 to May 23, 1961 Chairman of the Board of Alleghany and during those times exercised the duties and powers of the offices he held as set forth in the Charter and By-Laws of Alleghany and, except as so admitted, denies, upon information and belief, the allegations of paragraph 8 of the Complaint.

8. Admits, upon information and belief, that pleadings, motions, finding, opinions, reports, orders and judgments were filed and made from time to time in the actions referred to in paragraphs 19, 20, 22, 31, 32, 33, 37, 41 and 48 of the Complaint, refers to such pleadings, motions, findings, opinions, reports, orders and judgments for the terms thereof and, except as so admitted, denies, upon information and belief, the allegations of paragraphs 19, 20, 22, 31, 32, 33, 37, 41 and 48 of the Complaint.

9. Admits that Randolph Phillips ("Phillips") was one of the plaintiffs in *Breswick and Co., et al.* v. *United States* (S.D.N.Y. Civ. Action 101-114, hereinafter *"Breswick* v. *United States"*), and admits on information and belief, that during some period or periods of time Phillips was a consultant to counsel for plaintiffs in *Breswick and Co., et al.* v. *Briggs, et al.* (S.D.N.Y. Civ. Action 98-371, [fol. 296] hereinafter *"Breswick* v. *Briggs"*), and to counsel for objectant Rosen in *Zenn, et al.* v. *Anzalone, et al.*

(Sup. Ct. N.Y. Co. Index No. 7244/1954, hereinafter "*Zenn* State"), that on occasions between 1939 and 1955 Phillips was employed or retained by Alleghany, that in connection with one such retainer Phillips rendered services incident to the solicitation of proxies on behalf of Alleghany in connection with a stockholders' meeting of the New York Central Railroad Company in 1954, that on or about September 30, 1954 the then current retainer of Phillips by Alleghany terminated, that the actions *Breswick* v. *United States, Zenn* State, *Zenn, et al.* v. *Anzalone, et al.* (S.D.N.Y. Civ. Action No. 92-205, hereinafter "*Zenn* Federal"), and *Breswick* v. *Briggs* were commenced respectively on June 6, 1955, in 1954, in 1954, and on or about February 14, 1955, denies knowledge or information sufficient to form a belief as to the truth of the allegations in subparagraphs 24(e) and (f) of the Complaint, and except as so admitted denies the allegations of paragraphs 23 and 24 of the Complaint.

10. Admits, on information and belief, that *Breswick* v. *United States* was the subject of a number of decisions in various United States courts, more fully set out in reported decisions to which reference is made for their contents, being *Breswick & Co.* v. *United States,* 134 F. Supp. 132 (1955), *Breswick & Co.* v. *United States,* 138 F. Supp. 123 (1956), *Alleghany Corporation* v. *Breswick & Co.,* 353 U.S. 151 (1957), *Alleghany Corp.* v. *Breswick & Co.,* 355 U.S. 415 (1958), *Breswick & Co.* v. *United States,* 156 F. Supp. 227 (1957), and *Breswick & Co.* v. *United States,* 160 F. Supp. 754 (1958), that such action was dismissed on the merits, and except as so admitted denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 28 of the Complaint.

[fol. 297] 11. Admits, on information and belief, that Allan P. Kirby was never served with summons in *Zenn* State and never filed an answer therein, that Allan P. Kirby did serve an answer in *Zenn* Federal on November 18, 1954, and except as so admitted denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 29 of the Complaint.

12. Admits, on information and belief, that during April of 1955, at a settlement conference participated in by Abraham Pomerantz and William E. Haudek, general counsel for the plaintiffs in *Zenn* State and in *Zenn* Federal, Thomas F. Daly, of Lord, Day and Lord, representing the defendant Young, and Donald H. Carter, representing the Murchison defendants, with David W. Wallace, a representative of Alleghany Corporation, present, the parties agreed upon terms for settlement of all derivative actions then pending, that such settlement agreement was reduced to writing and executed under date of July 25, 1955 subject to the approval of the court as to its fairness and adequacy, that the cash amount of such settlement was $700,000, that on July 28, 1955 Alleghany moved in the State Court for approval of such settlement; that on August 18, 1955 Robert J. Fitzsimmons, Esq. of New York, N.Y. was appointed by the State Court as Referee to inquire into the fairness, reasonableness, and adequacy of such stipulation of settlement after giving due and proper notice to all stockholders of Alleghany Corporation, that notice of such hearings before the Referee was duly given to all shareholders by mail on August 23, 1955, that during the period from September 19, 1955 through January 20, 1956, the Referee, on some 35 days of hearings, heard 7 witnesses called by the proponents, 11 by the objectants, resulting in a transcript of some 4,600 pages and the consideration of some 480 exhibits, that David W. Wallace signed the proposed stipulation of settlement as attorney-[fol. 298] in-fact for Allan P. Kirby, and except as so admitted denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 30 of the Complaint.

13. Admits, on information and belief, that Allan P. Kirby never testified before the Referee appointed by the court in the *Zenn* State action, and except as so admitted denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 36 of the Complaint.

14. Admits that on April 19, 1960, at the regularly convened annual meeting of the stockholders of Investors Diversified Services, Inc. (hereinafter "IDS"), a majority of all of the outstanding shares of voting common stock of IDS (which majority included the stock owned by Alleghany) was voted in favor of a slate of nominees for directors, that the defendant Phillips was one of the nominees, that the nominees on such slate were duly elected as the Board of Directors of IDS, and except as so admitted denies the allegations of paragraph 50 of the Complaint.

15. Admits, on information and belief, that a decision in a civil action entitled *Gaudiosi* v. *Franklin* is reported at 166 F. Supp. 353, that a decision by the Securities and Exchange Commission captioned *In the Matter of United Corporation* is reported at 37 SEC 187, that a complaint was filed in the United States District Court for the District of Columbia in a civil action entitled *Myron Neisloss and Randolph Phillips* v. *Anthony S. Arpaia, et al.*, Civ. Action 2086-59, refers to the aforesaid decisions and complaint for the terms thereof, and except as so admitted denies the allegations of paragraph 52 of the Complaint.

[fol. 299] 16. Admits that the stock of IDS is not listed upon any national stock exchange but is quoted over-the-counter, that on April 18, 1960 the reported prices quoted were 215 bid and 229 asked, that on April 20, 1960 the reported prices were 185 bid and 201 asked, and except as so admitted denies the allegations of paragraph 54 of the Complaint.

17. Admits that on June 22, 1960 the Board of Directors of IDS appointed a Finance and Law Committee comprised of Fred M. Kirby, Charles T. Ireland, Jr., Randolph Phillips and the President of IDS ex officio, that the only member of the Board of Directors of IDS who voted against the appointment of such Committee was John D. Murchison, that Phillips was subsequently elected Chairman of said Committee at a salary of $2,500 per month, denies knowledge or information sufficient to form a belief as

to the period during which Phillips drew such salary, and except as so admitted denies the allegations of paragraphs 55 and 56 of the Complaint.

First Affirmative Defense

18. The Complaint fails to state a claim against this defendant upon which relief can be granted.

Second Affirmative Defense

19. This Court lacks jurisdiction over the subject matter of this action.

Third Affirmative Defense

20. This Court does not have jurisdiction of this action either upon the ground of diversity of citizenship or upon this Court's inherent jurisdiction or upon any other ground.

Fourth Affirmative Defense

21. Although this action purports to be brought as an action in equity, this action has not been brought, has not [fol. 300] been prosecuted, and is not being prosecuted in good faith.

Wherefore, on the foregoing Answer this defendant respectfully prays for judgment dismissing the Amended and Supplemental Complaint herein with the costs and disbursements of this action.

Donovan Leisure Newton & Irvine, By Robert M. Loeffler, A Member of the Firm, Attorneys for Defendant Fred M. Kirby, Office and P.O. Address, 2 Wall Street, New York 5, New York.

[fol. 300a] Acknowledgment of service (omitted in printing).

[fol. 301]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 60-3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR., and FRED M. KIRBY, Defendants.

REPLY OF PLAINTIFF TO COUNTERCLAIM BY DEFENDANT ALLAN P. KIRBY—Filed January 11, 1963

Plaintiff, Alleghany Corporation (hereafter "Alleghany"), by its attorneys, Townley, Updike, Carter and Rodgers, as and for its reply to the counterclaim (hereafter "counterclaim") alleged in paragraph 26 of the Answer (hereafter "Answer") of defendant Allan P. Kirby to the amended and supplemental complaint herein:

26(a) Admits that a supplemental stipulation of purported settlement dated December 24, 1959 was entered into by Allan P. Kirby, by Charles T. Ireland as counsel for Alleghany, and by Seymour Graubard as counsel for objectant Rosen in the *Zenn* (State) action, respectfully refers the Court to such stipulation for the complete terms thereof and to the allegations of the amended and supplemental complaint herein as to the circumstances leading to and surrounding the execution thereof and, except as so admitted, denies the allegations of paragraph 26(a) of said Answer.

26(b) Admits that an order was made and entered in the *Zenn* (State) action on December 28, 1959, respectfully refers to such order for the complete terms thereof and,

[File endorsement omitted]

except as so admitted, denies the allegations of paragraph 26(b) of said Answer.

[fol. 302] 26(c) Admits the allegations of paragraph 26(c) of said Answer.

26(d) Denies the allegations of paragraph 26(d) of said Answer.

First Affirmative Defense

The Answer fails to state a counterclaim upon which relief can be granted.

Wherefore, Plaintiff respectfully prays judgment dismissing the counterclaim stated in said Answer of Defendant Allan P. Kirby, together with the costs and disbursements occasioned thereby.

Townley, Updike, Carter & Rodgers, By Stuart N. Updike, A Member of the Firm, Office & P. O. Address, 220 East 42nd Street, New York 17, New York.

[fol. 303] Affidavit of service (omitted in printing).

[fol. 304]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR., and FRED M. KIRBY, Defendants.

NOTICE OF INTERROGATORIES PROPOUNDED ON BEHALF OF DEFENDANTS ALLAN P. KIRBY, FRED M. KIRBY AND CHARLES T. IRELAND, JR.—Filed December 26, 1962

To: Alleghany Corporation, Plaintiff:

Please Take Notice that pursuant to Rule 33 of the Federal Rules of Civil Procedure, you are required to serve upon the undersigned within 15 days after service hereof, answers to the within interrogatories propounded on behalf of Defendants Allan P. Kirby, Fred M. Kirby and Charles T. Ireland, Jr.

Dated: New York, New York, December 21, 1962.

Yours, etc.,

Donovan Leisure Newton & Irvine, By Granville Whittlesey, Jr., A Member of the Firm, Attorneys for Defendants Allan P. Kirby and Fred M. Kirby, 2 Wall Street, New York 5, New York;

Kissam & Halpin, Esqs., By Leo T. Kissam, A Member of the Firm, Attorneys for Defendant Charles T. Ireland, Jr., 120 Broadway, New York 5, New York.

[File endorsement omitted]

To:

Townley, Updike, Carter & Rodgers, Esqs., Attorneys for Plaintiff Alleghany Corporation, 220 East 42nd Street, New York 17, New York;

Randolph Phillips, Attorney Pro Se, 128 East 70th Street, New York 21, New York.

[fol. 305]

ATTACHMENT TO NOTICE OF INTERROGATORIES

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 60 Civ. 3511

[Title omitted]

INTERROGATORIES PROPOUNDED ON BEHALF OF DEFENDANTS ALLAN P. KIRBY, CHARLES T. IRELAND, JR. AND FRED M. KIRBY

1. (a) List and describe each book, paper, record, and document (other than work papers prepared by plaintiff's counsel subsequent to May 23, 1961), the existence of which is known to plaintiff which contains any "fact" or "circumstance" which was

(i) a fact "which at the time of the 1950 Exchange Transaction he [defendant Allan P. Kirby] knew or should have known concerning the financial condition, future earnings and prospects of IDS [or] the ability of IDS to meet its contractual requirements;" or was

(ii) a "fact" or "circumstance" "concerning the purported authorization of [the] 1950 Exchange Transaction by the Board of Directors of Alleghany [or] the steps in consummation thereof,"

which fact or circumstance allegedly was "material to an evaluation of his [Mr. Kirby's] liability on the claims arising out of [the] 1950 Exchange Transaction and the settlement proposed in connection therewith" which Mr. Kirby, allegedly, "fail[ed] to adduce or cause to be adduced [fol. 306] before the Referee, Special Master, this Court or the New York Supreme Court."

(b) As to each book, paper, record, and document referred to in Paragraph (a) above, state whether plaintiff has possession, custody or control thereof and, if not, give the name and address of the custodian thereof if known to plaintiff, otherwise give the name and address of each person known to plaintiff to have a copy thereof.

(c) As to each book, paper, record, and document referred to in Paragraph (a) above, give the date when said book, paper, record, or document came into existence, name all persons who have or have had custody of said book, paper, record, or document and of each copy thereof at any time between its creation (or November 11, 1948, whichever is later) and December 18, 1962, giving the dates of such custodianship and the location of such book, paper, record, document, or copy thereof at all times during each such custodianship.

2. As to each book, paper, record, document, and copy referred to in the answer to Interrogatory 1 above, state whether defendant Allan P. Kirby knows or ever knew of the existence thereof.

(a) If so, give the date and describe the circumstances of each instance known to plaintiff when said book, paper, record, document or copy came to Mr. Kirby's attention; give the names and addresses of all witnesses to each such event and list and describe all documents which reflect such event or which reflect knowledge on Mr. Kirby's part of the existence of or the contents of such book, paper, record, or document.

(b) If plaintiff contends only that Mr. Kirby should [fol. 307] have known or had reason to know of the existence of such book, paper, record, or document, state, in detail, the facts which support this contention.

3. Set forth each fact and each circumstance of the nature described in Interrogatory 1, above, which was contained in a book, paper, record, or document referred to in said interrogatory which defendant Allan P. Kirby knew, should have known, or had reason to know from a source or sources other than such book, paper, record, or document or books, papers, records, or documents referred to above. As to each such fact actually known to Mr. Kirby, give the date and describe the circumstances of each instance known to plaintiff when such fact came to Mr. Kirby's attention; give the names and addresses of all witnesses to each such event, and list, describe, and name the custodian of all documents which reflect such event or which reflect Mr. Kirby's knowledge of such fact. If plaintiff contends only that Mr. Kirby should have known or had reason to know such fact, state, in detail, the facts upon which plaintiff bases this contention.

4. Set forth, in detail, each fact and each circumstance of the nature described in Interrogatory 1 which is not contained in a book, paper, record, or document referred to in answer to Interrogatory 1, of which Allan P. Kirby knew, should have known, or had reason to know. As to each such fact actually known to Mr. Kirby, give the date and describe the circumstances of each instance known to plaintiff when such fact came to Mr. Kirby's attention; give the names and addresses of all witnesses to each such event, and list, describe, and name the custodian of all documents which reflect such event or which reflect knowledge on Mr. Kirby's part of such fact. If plaintiff contends only that [fol. 308] Mr. Kirby should have known or had reason to know such fact, state, in detail, the facts on which plaintiff bases this contention.

5. List each book, paper, record, and document referred to in answer to Interrogatory 1 above which was not, prior to November 17, 1958, seen by or made available for inspection to one or more of the following: Seymour Graubard, George Brussel, Jr., Abraham Pomerantz, or one or more of the other counsel for plaintiffs in *Zenn* or *Breswick* or the objectants or intervenors in Zenn; Eric J. Klinger; Referee (Special Master) Robert Fitzsimmons; or the State or Federal Courts. State, in detail, the facts upon which plaintiff's response with respect to each such book, paper, record, and document is based, including, in particular, a statement as to whether such document (a) was not included among the groups of documents made available for inspection to Mr. Graubard, Mr. Brussel, Mr. Pomerantz or one or more of the other counsel for plaintiffs in *Zenn* or *Breswick* or the objectants or intervenors in *Zenn* or Eric J. Klinger from the files of Alleghany Corporation at various times, prior to November 17, 1958, when the hearings were not in session; (b) was not included in documents produced by Robert Purcell for inspection in the hearing room during the *Zenn* proceedings; (c) was not produced for or offered to Referee (Special Master) Fitzsimmons for his inspection as to relevance, materiality, etc. during the *Zenn* and/or *Breswick* proceedings.

6. Set forth, in detail, the facts which purportedly establish that Allan P. Kirby was "one of [the] proponents" in the State Court of the proposed settlement of July, 1955 (See Par. 30 of the Amended and Supplemental Complaint).

[fol. 309] 7. Set forth fully and in detail all means allegedly used by defendant Allan P. Kirby to effect the "concealment of facts material to the existence and extent of his liability to Alleghany arising out of the 1950 Exchange Transaction" to the extent such concealment is claimed to have constituted something more than mere

"fail[ure] to adduce or cause to be adduced before the Referee, Special Master, this Court or the New York Supreme Court" facts of the nature described in paragraph 39 of the Amended and Supplemental Complaint. (See paragraph 58 of the Amended and Supplemental Complaint.) List and describe each book, paper, record, and document containing facts given in answer to the first sentence of this interrogatory (and give the name and address of the custodian of each such book, paper, record and document) and state the name and address of each witness having knowledge of such facts.

8. State the source, if known to plaintiff, of the material quoted at page 58 of the Report of the Referee in *Zenn* v. *Anzalone* which reads as follows " 'that a director who was financially interested in a contract or transaction with the corporation may be counted in determining the existence of a quorum at any meeting, and may vote to authorize such contract as if he were not personally interested.' " List and describe every legal text, case decision, book, paper, record, document, or other writing known to plaintiff which existed prior to November 17, 1958, which contained the quoted material.

9. State the author, address, date, title and present location of any memoranda, correspondence or other documents (other than those documents previously described in answer to any interrogatory herein) relied upon in answering any interrogatory herein and the name and address of the person who has custody or control thereof.

[fol. 310] Dated: New York, New York, December 21, 1962.

[fol. 311] Affidavit of service (omitted in printing).

[fol. 312]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR., and FRED M. KIRBY, Defendants.

NOTICE OF INTERROGATORIES PROPOUNDED ON BEHALF OF PLAINTIFF—Filed January 2, 1963

To: Allan P. Kirby, Defendant:

Please Take Notice that pursuant to Rule 33 of the Federal Rules of Civil Procedure, you are required to serve upon the undersigned within 15 days after service thereof, answers to the within interrogatories propounded on behalf of Plaintiff Alleghany Corporation.

Dated: New York, New York, December 31, 1962.

Yours, etc.

Townley, Updike, Carter & Rodgers, By John J. Macchia, A Member of the Firm, Attorneys for Plaintiff Alleghany Corporation, 220 East 42nd Street, New York 17, New York.

To:

Donovan Leisure Newton & Irvine, Esqs., Attorneys for Defendants Allan P. Kirby and Fred M. Kirby, 2 Wall Street, New York 5, New York;

Kissam & Halpin, Esqs., Attorneys for Defendant Charles T. Ireland, Jr., 120 Broadway, New York 5, New York;

[File endorsement omitted]

Randolph Phillips, Pro Se, 128 East 70th Street, New York 21, New York.

[fol. 313]

ATTACHMENT TO NOTICE OF INTERROGATORIES

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

[Title omitted]

INTERROGATORIES PROPOUNDED ON BEHALF OF PLAINTIFF ALLEGHANY CORPORATION

I. (a) List and describe each diary, appointment book, telephone log and time record of any nature, type or description recording, reflecting or in any manner referring to your activities, conferences, meetings, telephone calls or appointments between November 11, 1948 and May 18, 1950, directly or indirectly with, or referring to:

(1) Investors Diversified Services, Inc. (hereinafter "IDS"), any of its affiliates or subsidiaries or any employee or representative of its affiliates or subsidiaries;

(2) Alleghany Corporation;

(3) Robert R. Young;

(4) Robert W. Purcell;

(5) Frank Bateman;

(6) Brooks Potter;

(7) Charles Shipman;

(8) Alvin J. Stiver or Saunders Stiver & Co. or any representative or employee thereof;

(9) Salim (Cy) Lewis or Bear Stearns & Co. or any representative or employee thereof;

(10) Joseph J. Anzalone;

(11) Bertin C. Gamble;

(12) Earl E. Crabbe; or

(13) Norman Waag

[fol. 314] I (b) As to each diary, appointment book, telephone log and time record referred to in (a) above give the name of the person or persons who made entries therein and the general practice followed in making such entries.

I (c) List the present location and custodian of each diary, appointment book, telephone log and time record referred to in (a) above.

II. List and describe the date, place, names of persons present or participating and subject matter of each meeting, conference, telephone call, appointment or activity by you between November 11, 1948, and May 18, 1950, directly or indirectly with or referring or relating to each of the persons or entities in paragraphs I (a)(1) through I(a)(13) above (including but not limited to entries made in each diary, telephone log, appointment book and other time record listed and described in response to paragraph I above) and concerning IDS or the capital stock thereof or the subsidiaries of IDS or the capital stock thereof.

III. List and describe each file, or other means of keeping correspondence, records, reports, memoranda, working papers or other writings concerning IDS, its financial condition or prospects and any proposed or executed transaction in the capital stock of IDS or its subsidiaries or affiliates prepared by or for or pertaining, relating or referring to any of the persons or entities enumerated in paragraphs I(a)(1) through I(a)(13) above during the period November 11, 1948, through May 18, 1950 and received by you in

[fol. 315] the period November 11, 1948 through December 30, 1959.

IV. List and describe, including date, persons involved and subject matter, each letter, report, memorandum, working paper or other writings concerning IDS, its financial condition or prospects and any proposed or executed transaction in the capital stock of IDS or its subsidiaries or affiliates prepared by or for or referring or relating to any of the persons or entities enumerated in paragraphs I(a)(1) through I(a)(13) above during the period November 11, 1948 through May 18, 1950 and received by you in the period November 11, 1948 through December 30, 1959.

Townley, Updike, Carter & Rodgers, By John J. Macchia, Attorneys for Plaintiff.

[fol. 316] Affidavit of service (omitted in printing).

[fol. 317]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR., and FRED M. KIRBY, Defendants.

NOTICE OF HEARING—Filed January 4, 1963

Please Take Notice that the undersigned will bring the annexed objections on for hearing before this Court in the Chambers of the Hon. Archie O. Dawson, Room 2102, United States Courthouse, Foley Square, New York, New York, on the 15th day of January, 1963, at 4:30 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard.

Dated: January 3, 1963.

Townley, Updike, Carter & Rodgers, Attorneys for Plaintiff, Office and P.O. Address, 220 East 42nd Street, New York 17, New York, By William P. Hindman, Jr., A Member of the Firm.

To:

Kissam & Halpin, Attorneys for Defendant Charles T. Ireland, Jr., 120 Broadway, New York 5, New York;

Donovan Leisure Newton & Irvine, Attorneys for Defendants Allan P. Kirby and Fred M. Kirby, Two Wall Street, New York 5, New York;

[File endorsement omitted]

Randolph Phillips, Appearing Pro Se, 128 East 70th Street, New York 21, New York.

[fol. 318]

ATTACHMENT TO PLAINTIFF'S NOTICE OF HEARING

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

[Title omitted]

OBJECTIONS TO INTERROGATORIES PROPOUNDED ON BEHALF OF DEFENDANTS ALLAN P. KIRBY, CHARLES T. IRELAND, JR., AND FRED M. KIRBY

Plaintiff objects, pursuant to Federal Rules 30(b) and 33 and Local Rule 9(e), to the interrogatories served on it by defendants Allan P. Kirby, Fred M. Kirby and Charles T. Ireland, Jr., on December 21, 1962, upon the grounds hereafter stated:

First: *As to Interrogatory "1(c)":*

A. *Interrogatory "1"* insofar as here pertinent makes the following demand:

> "1. (a) List and describe each book, paper, record, and document (other than work papers prepared by plaintiff's counsel subsequent to May 23, 1961), the existence of which is known to plaintiff which contains any 'faot' or 'circumstance' which was
>
> > "(i) a fact 'which at the time of the 1950 Exchange Transaction he [defendant Allan P. Kirby] knew or should have known concerning the financial condition, future earnings and prospects of IDS [or] the ability of IDS to meet its contractual requirements;' or was

"(ii) a 'fact' or 'circumstance' 'concerning the purported authorization of [the] 1950 Exchange Transaction by the Board of Directors of Alleghany [or] the steps in consummation thereof,'

which fact or circumstance allegedly was 'material to an evaluation of his [Mr. Kirby's] liability on the claims arising out of [the] 1950 Exchange Transaction and the settlement proposed in connection therewith' which Mr. Kirby, allegedly, 'fail[ed] to adduce or cause to be adduced before the Referee, Special Master, this Court or the New York Supreme Court.'

* * * * * * *

[fol. 319] "(c) As to each book, paper, record, and document referred to in Paragraph (a) above, give the date when said book, paper, record, or document came into existence, *name all persons who have or have had custody of said book, paper, record, or document and each copy thereof at any time between its creation (or November 11, 1948, whichever is later) and December 18, 1962, giving the dates of such custodianship and the location of such book, paper, record, document, or copy thereof at all times during each such custodianship.*"

B. *Objections*: The matter italicized above is objected to upon the ground that the interrogatory calls for irrelevant information which could not possibly lead to the discovery of evidence and would be unduly burdensome, indeed in most instances impossible, for plaintiff to ascertain. The issues posed in the pleadings in this litigation turn upon Mr. Kirby's claimed violation of his fiduciary duties in failing to adduce or cause to be adduced before the Referee, Special Master, this Court, the New York Supreme Court or Alleghany Corporation facts which he knew or should have known with respect to the 1950 IDS Exchange Transaction. Consequently, the interrogatory has no bearing on the issues of this case to the extent that it demands the names of persons having (or who had) cus-

tody and the location of such custody of both originals and all copies of documents beyond such copies as were or are in the files of the corporations to whom Mr. Kirby owed a fiduciary duty or about which Mr. Kirby knew or should have known by reason of his fiduciary relationship to such corporations or which were brought to his attention. The underscored matter, therefore, is a demand for tion. The italicized matter, therefore, is a demand for irrelevant information and should be stricken, cf. *Bullard v. Universal Millwork Corp.*, 25 F.R.D. 342 (E.D.N.Y. 1960).

Second: *As to Interrogatory "2"*:

A. *Interrogatory "2"* insofar as here pertinent makes the following demand:

> "2. As to each book, paper, record, document, and copy referred to in the answer to Interrogatory 1 above, state whether defendant Allan P. Kirby knows or ever knew of the existence thereof.
>
> [fol. 320] "(a) If so, give the date and describe the circumstances of each instance known to plaintiff when said book, paper, record, document or copy came to Mr. Kirby's attention; give the names and addresses of all witnesses to each such event and list and describe all documents which reflect such event or which reflect knowledge on Mr. Kirby's part of the existence of or the contents of such book, paper, record, or document.
>
> "(b) If plaintiff contends only that Mr. Kirby should have known or had reason to know of the existence of such book, paper, record, or document, state, in detail, the facts which support this contention."

B. *Objections*: The foregoing interrogatory is objected to upon the following grounds:

> (1) It calls upon plaintiff to state a conclusion as to an ultimate fact in this litigation, namely, "whether

defendant Allan P. Kirby knows or ever knew" of a particular document. What Mr. Kirby "knows" or "ever knew" can be directly answered only by Mr. Kirby or by a conclusion to be drawn from the facts adduced in the trial of this matter. Plaintiff and the Court can only conclude from the facts adduced that Mr. Kirby knows or knew of particular documents;

(2) At best the interrogatory as presently drafted is a demand that plaintiff specify its contentions with respect to "each book, paper, record, document and copy referred to in interrogatory 1", i.e., whether plaintiff contends Mr. Kirby "knew" or "knows" or whether Mr. Kirby "should have known" of each item listed in response to interrogatory "1". This is exactly the use of interrogatories condemned in *United States* v. *Carter Products, Inc.*, 28 F.R.D. 373, 376-7 [fol. 321] (1961):

> "Each of these interrogatories sets forth a contention and asks whether it is one which the Government expects to make. The set represents an improper attempt to impede the Government's flexibility in framing for itself the eventual contentions and legal theories which it will present for trial. I therefore rule that, at this stage of preparatory efforts, plaintiff need not respond. If Carter wishes to separate contentions as to which there is no controversy from those which are disputed, it has recourse to Fed.R.Civ.P. 36, to requests for stipulations and to requests for an exchange of written statements of each party's theories of the case. See United States v. Procter & Gamble Co., supra; Central Hide & Rendering Co. v. B-M-K Corp., D.C.D.Del. 1956, 19 F.R.D. 294.

See also *Meixsell* v. *Delaware Lackawanna & Western R.R.*, 3 Fed. R. Serv.2d 33.12 (Case 1) (E.D. Pa. 1960); compare *United States* v. *New Wrinkle Inc.*, 16 F.R.D. 35 (S.D. Ohio 1954).

(3) Moreover, the interrogatory asks plaintiff to give the date and describe "each instance", "give the names" of "all witnesses to each such event" and "describe all documents which reflect such event" and later "to state in detail" the facts in support of a contention by plaintiff. This facet of the interrogatory is objectionable as an effort to truncate plaintiff's factual contentions and is improper as a demand for the detail of all the facts in plaintiff's case on this subject matter. *Rowbotham* v. *The Atlantic,* 192 F.Supp. 705, 706-7 (S.D.N.Y. 1961): "Delete the words 'in detail' from interrogatory 2(a) * * * ." And see *United States* v. *Continental Can Co.,* 22 F.R.D. 241 (S.D.N.Y. 1958), [fol. 322] where interrogatories seeking "what facts will be relied upon to prove 'decisive advantage' were stricken":

> "If plaintiff were required to answer these interrogatories 'it would, in effect, be required to present its case in advance of trial.' This it need not do, particularly in view of the facts which plaintiff is required to supply under the foregoing five categories where its objections are overruled."

Third: *As to Interrogatory "3"*:

A. *Interrogatory "3"* makes the following demand:

> "3. Set forth each fact and each circumstance of the nature described in Interrogatory 1, above, which was contained in a book, paper, record, or document referred to in said interrogatory which defendant Allan P. Kirby knew, or should have known, or had reason to know from a source or sources other than such book, paper, record, or document or books, papers, records, or documents referred to above. *As to each such fact actually known to Mr. Kirby, give the date and describe the circumstances of each instance known to plaintiff when such fact came to Mr. Kirby's attention; give the*

names and addresses of all witnesses to each such event, and list, describe, and name the custodian of all documents which reflect such event or which reflect Mr. Kirby's knowledge of such fact. If plaintiff contends only that Mr. Kirby should have known or had reason to know such fact, state, in detail, the facts upon which plaintiff bases this contention."

B. *Objections*: The matter italicized above with respect to facts "actually known to Mr. Kirby" is objected to upon the grounds stated with respect to interrogatory "2".

Fourth: *As to Interrogatory "4"*:

A. *Interrogatory "4"* insofar as here pertinent makes the following demand:

"4. Set forth, in detail, each fact and each circumstance of the nature described in Interrogatory 1 which is not contained in a book, paper, record, or document referred to in answer to Interrogatory 1, of which [fol. 323] Allan P. Kirby knew, should have known, or had reason to know. *As to each such fact actually known to Mr. Kirby, give the date and describe the circumstances of each instance known to plaintiff when such fact came to Mr. Kirby's attention; give the names and addresses of all witnesses to each such event, and list, describe, and name the custodian of all documents which reflect such event or which reflect knowledge on Mr. Kirby's part of such fact. If plaintiff contends only that Mr. Kirby should have known or had reason to know such fact, state, in detail, the facts on which plaintiff bases this contention."*

B. *Objections*: The matter italicized above is objected to upon the same ground as stated in objections to interrogatories "2".

Fifth: *As to Interrogatory "5"*:

A. *Interrogatory "5"* makes the following demand:

"5. List each book, paper, record, and document referred to in answer to Interrogatory 1 above which was not, prior to November 17, 1958, seen by or made available for inspection to one or more of the following: Seymour Graubard, George Brussel, Jr., Abraham Pomerantz, or one or more of the other counsel for plaintiffs in *Zenn* or *Breswick* or the objectants or intervenors in *Zenn;* Eric J. Klinger; Referee (Special Master) Robert Fitzsimmons; or the State or Federal Courts. State, in detail, the facts upon which plaintiff's response with respect to each such book, paper, record, and document is based, including, in particular, a statement as to whether such document (a) was not included among the groups of documents made available for inspection to Mr. Graubard, Mr. Brussel, Mr. Pomerantz or one or more of the other counsel for plaintiffs in *Zenn* or *Breswick* or the objectants or intervenors in *Zenn* or Eric J. Klinger from the files of Alleghany Corporation at various times, prior to November 17, 1958, when the hearings were not in session; (b) was not included in documents produced by Robert Purcell for inspection in the hearing room during the *Zenn* proceedings; (c) was not produced for or offered to Referee (Special Master) Fitzsimmons for his inspection as to relevance, materiality, etc. during the *Zenn* and/or *Breswick* proceedings."

[fol. 324] B. *Objections:* The information requested in this interrogatory is irrelevant. Mr. Kirby was under a duty to bring to the attention of the Court the facts and circumstances which are the subject of interrogatory "1". Even if those facts and circumstances were known to others, Mr. Kirby is not relieved of that duty. The fact that shareholders in the underlying *Zenn* or *Breswick* actions may

have had means of ascertaining concealed facts does not remove Mr. Kirby's liability for failing in his duty to disclose those facts. *Albert* v. *Title Guarantee & Trust Co.*, 277 N.Y. 421, 14 N.E.2d 625 (1938); *R. C. Gluck & Co.* v. *Tankel,* 190 N.Y.S.2d 12 (Sup. Ct. N.Y. Co. 1960) (not officially reported). See *Heddendorf* v. *Goldfine,* 167 F. Supp. 915, 926-7 (D. Mass. 1958).

Moreover, subparagraphs "(a)", "(b)" and "(c)" of the interrogatory should be stricken because they place an unnecessary burden upon the plaintiff. The facts demanded by those subparagraphs can be ascertained by defendants by utilizing the information given in answer to interrogatory "1".

Sixth: *As to Interrogatory "8"*:

A. *Interrogatory "8"* makes the following demand:

> "8. State the source, if known to plaintiff, of the material quoted at page 58 of the Report of the Referee in *Zenn* v. *Anzalone* which reads as follows '"that a director who was financially interested in a contract or transaction with the corporation may be counted in determining the existence of a quorum at any meeting, and may vote to authorize such contract as if he were not personally interested."' List and describe every legal text, case decision, book, paper, record, document, or other writing known to plaintiff which existed prior to November 17, 1958, which contained the quoted material."

[fol. 325] B. *Objections*: The information requested in this interrogatory is not relevant. The source of the quoted material and whether or not it appeared elsewhere has no bearing on this case. The quotation in question was erroneous and Mr. Kirby was under a fiduciary duty to bring that error to the attention of the Court no matter how the error occurred.

Moreover, plaintiff should not be required to make the exhaustive search required by the last sentence of inter-

rogatory "8". Interrogatories should not be used to compel others to make compilations or perform research. *Konczakowski* v. *Paramount Pictures,* 20 F.R.D. 588 (S.D.N.Y. 1957). This is particularly true of that portion of the request which refers to legal texts and case decisions or material submitted in the record of *Zenn* or *Breswick* since these are public records. *Hillside Amusement Co.* v. *Warner Bros. Pictures Distributing Corp.* 17 Fed. Rules Serv. 33.321 case 5 (S.D.N.Y. 1952).

Seventh: *As to Interrogatory "9"*:

A. *Interrogatory "9"* makes the following demand:

> "9. State the author, address, date, title and present location of any memoranda, correspondence or other documents (other than those documents previously described in answer to any interrogatory herein) relied upon in answering any interrogatory herein and the name and address of the person who has custody or control thereof."

B. *Objections*: Here again the defendants are seeking irrelevant information. All of the relevant documents must be identified in response to the other interrogatories. To the extent, therefore, that other materials are sought defendants' demand is an effort to reach irrelevant items or working papers.

[fol. 326] The rule in the Southern District is that an interrogatory requesting the names of persons who assisted in the preparation of answers is objectionable. *Hopkinson Theatre, Inc.* v. *RKO Radio Pictures, Inc.,* 18 F.R.D. 379 (S.D.N.Y. 1956). The same rule should apply to documents.

Wherefore, I respectfully ask that the Court sustain the foregoing objections to defendants' interrogatories.

William P. Hindman, Jr., A member of the firm, Townley, Updike, Carter & Rodgers, Attorneys for Plaintiff.

Sworn to before me this 3rd day of January, 1963.

Adelaide R. O'Neill, Notary Public, State of New York, No. 03-8221185, Qualified in Bronx County, Cert. filed in New York County. Commission Expires March 30, 1964.

[fol. 327]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

ENDORSEMENT

Alleghany Corporation v. *Kirby, et al.* 60 Civ. 3511

ORDER SUSTAINING CERTAIN OBJECTIONS TO INTERROGATORIES AND OVERRULING OTHERS—January 15, 1963

A hearing was held today on these objections to interrogatories. Objections are sustained as to the italicized portion of Interrogatory 1; objection sustained as to Interrogatory 9. All other objections are overruled. So ordered.

Dated: New York, N. Y., January 15, 1963.

Archie O. Dawson, U. S. D. J.

[File endorsement omitted]

[fol. 328]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

v.

ALLAN P. KIRBY, RANDOLPH PHILLIPS, FRED M. KIRBY, CHARLES T. IRELAND, JR., Defendants.

Transcript of Hearing—January 15, 1963

Chambers—2102

Before: Hon. Archie O. Dawson, D.J.

APPEARANCES:

Townley, Updike, Carter & Rodgers, Esqs., Attorneys for Plaintiff, Stuart N. Updike, Esq., and Lee W. Meyer, Esq., of Counsel.

Donovan, Leisure, Newton & Irvine, Esqs., Attorneys for Defendants Allan P. Kirby and Fred M. Kirby, Walter L. Stratton, Esq., Robert M. Loeffler, Esq., and John J. McCann, Esq., of Counsel.

Kissam & Halpin, Esqs., Attorneys for Defendant Charles T. Ireland, Leo T. Kissam, Esq., and Anthony J. Genovese, Esq., of Counsel.

[fol. 329]

COLLOQUY BETWEEN COURT AND COUNSEL RE DATE OF TRIAL, AND RE OBJECTIONS TO INTERROGATORIES AND RULING THEREON

The Court: This is objections to interrogatories in this case.

Before we go into it, I have read Mr. Kissam's—I guess it is Mr. Kissam's—memorandum of information. Something there bothered me considerably.

On Page 8 he said something to the effect that if certain things are done this will contribute considerably toward making April 1st a realistic date upon which to begin trial.

Then on Page 9 he said "More than a month has already passed since defendants agreed that they would try to shoot for trial on April 1st."

Now, is this April 1st date a real date or isn't it? I say that because I have here an application by the government to start the trial of a government anti-trust case, and put this Alleghany case down for April and if there is any doubt in it I am just going to put it over until next year.

Mr. Kissam: I think what you do today will pretty well answer that question.

The Court: No, I want to know now. Are we going to try it now? If not, it will go over to next year.

Mr. Kissam: We are making all our plans for April 1st. [fol. 330] We are examining Mr. Daly as soon as this short trial I told you about is over, which is now before Judge Silverman. Then Daly will be examined and then after that we are getting on a basis of practically day-by-day to finish up anybody that—

The Court: Is there any doubt in the mind of anybody they will go to trial on April 1st? If there is a doubt in anybody's mind, I am not going to put aside April 1st. I am just going to try U. S. against Kennecott Copper Company.

Mr. Kissam: May I have a minute to consult with my associates?

Just before that, I will say, in my own mind at least, my only doubt will be that if as a result of these new elements that have been added, some problem is created—now, I don't believe it will, but—

The Court: Before we go onto this, I want to know that because I have got to fix my calendar. Do you want to step outside, Mr. Kissam?

Mr. Kissam: Will you excuse me just a minute, your Honor?

The Court: Yes.

(Recess.)

Mr. Kissam: Your Honor, I have consulted with Mr. [fol. 331] Stratton, Mr. Genovese, Mr. Loeffler, and the other gentlemen, and we believe that we will be ready to proceed on the first Monday in April.

The Court: Well, on that understanding I will leave that date as the date for the trial of this case, but that has got to be as definite as all this: If the plaintiff is not ready to go to trial on that date, I am going to dismiss the case, and if the defendants are not ready to go to trial on that date, I will enter judgment against the defendants.

I mean, there is no tentative date here. It is a date for trial just like any other date for trial. Nothing can stand in the way of it.

Mr. Kissam: That is the 1st of April. I see it is a Monday.

The Court: It is April Fools' day. There will be no fooling around. I just want to get that clear.

Now we can go—

Mr. Updike: As far as the plaintiff is concerned, the plaintiff is expected to be ready to go forward on April 1.

Mr. Loeffler: Judge, may I address myself to that, because when we say we want to go forward on April 1, and we hope and expect to go forward on April 1, it is in en- [fol. 332] tire good faith, but when on December 12th, I

believe it was, you gave the plaintiff leave to file an amended complaint in abbreviated form, we told you at that time that we wanted to take advantage of your Honor's offer to put aside the month of April and we would move heaven and earth to be ready by that date, but that we did have the mental reservation, and we expressed it on the record, at that time, that in the event the answers to interrogatories posed very serious problems, or in the event we did not get the information out of the interrogatories that we expected, to pose, as soon as we saw the complaint in its final form, we did want to advise your Honor that we would come back with an application as soon as that fact was known.

Now, as of today I think that today is the turning point on these new issues that have been added to the complaint of December, and I think today's decision will quite probably make the April 1st date entirely possible, feasible, and there will be no objection to it from either side of the table.

The Court: It was defendants who filed the notice of readiness for trial, as I recall it.

Mr. Loeffler: It was Mr. Phillips.

The Court: Mr. Phillips, who is an attorney.

[fol. 333] Mr. Kissam: I think you found fault with the form of it.

The Court: Yes, but there was a notice of readiness for trial and the plaintiff says they are ready to go to trial on that date, and if the defendants aren't ready to go to trial on that date, we will have an inquest, so I mean this case has got to get moving.

Mr. Loeffler: We want to go to trial on it and we want to go on April 1st, your Honor, and I think unless something extraordinary comes out of today's proceedings we can and will go forward on that date.

The Court: Yes. Well now, on this motion, these are objections to interrogatories. As I understand it from the objections which have been filed, the only things objected

to are the parts which are italicized in the interrogatories, is that correct?

Mr. Updike: Yes, sir, and we have answered the others.

The Court: Now, what is the objection to this part of Interrogatory 1?

Mr. Updike: Interrogatory 1 starts out by asking for a list and a description of each book, paper, record and document.

The Court: That you have answered.

[fol. 334] Mr. Updike: Beg your pardon?

The Court: That you have answered.

Mr. Updike: And that we have answered. Under that we have shown—we have listed the documents, described them by their common names. We have stated their location and we have furnished the date when they were created, when the plaintiff knows that fact.

Now, with respect to the underlying portions, the names of persons who have or have had custody between November 11, 1948, and the present time, it seems to us is an unnecessary amassing of irrelevant information as far as this lawsuit is concerned.

The Court: Well, certainly they are entitled to know who has custody of it now.

Mr. Updike: We have given that. We have shown in answer to "1"—

The Court: Let me ask, Mr. Kissam, why shouldn't you limit it to who now has custody of these documents? Why do you need to know who had these—

Mr. Kissam: I am going to ask Mr. Stratton if he can answer this, if your Honor please.

Mr. Stratton: Your Honor, I have taken the burden of the preparation of our papers on this because Mr. Kissam has been on trial, but let me say if this case is a case [fol. 335] wherein the plaintiff is alleging a concealment, it is one thing. If it is a case wherein what they are alleging is merely a failure by Mr. Kirby to adduce certain documentary or other evidence into the record before the Referee, we have a different kind of a case.

Now, in one paragraph of the complaint, and it is Paragraph 39, they accuse Mr. Kirby of having failed to adduce evidence before the Referee.

In Paragraph—I believe it is 58—of the complaint, they say Mr. Kirby concealed. Now, those are two different things, and to me it is impossible to know whether a document or a book or a paper has been concealed if there are many, many copies of it, and if it has been broadcast generally.

It is also impossible for me to conceive of a document as having been concealed if, for instance, it is on file in the files of IDS, where it can be reached by subpoena, and no effort has been taken by anybody to conceal it in those files, to misfile it, and it is the kind of thing that the entire world is on notice of, would be found exactly in those files, such as we have just today received answers to the interrogatories.

[fol. 336] There are many, many periodic physical reports of IDS, which they say Mr. Kirby concealed.

The Court: Why do you need to know who had custody of these documents?

Mr. Stratton: We need to know for instance whether Mr. Graubard had a copy of the documents or what copy of the documents was sent to 8000 stockholders, or whether it was nailed to the courthouse door.

The Court: You asked before whether Mr. Graubard had—

Mr. Stratton: This was the same question as No. 5, which is why I collected the two of them together and treated them generally.

If these papers are a matter of official record or part of the court records or nailed to the courthouse door, to coin a phrase, Mr. Kirby could hardly have concealed although it would nevertheless be undisputed those documents would not have been put in evidence once the document is produced and its existence was proven during the time of the hearings. That is an end of failure to adduce.

The question of relevance would remain, of course, but if it is a matter of concealment the document can hardly be concealed in which there are, say, 100 copies which have [fol. 337] been broadcast throughout the country.

Mr. Meyer today told me they would have great difficulty in answering the interrogatories with respect to one document in particular, because he said their information is that 100 copies of that document have been adduced. They have located only two of them.

The Court: Why should they go around and trace the other 98 copies?

Mr. Stratton: They should not if they are not charging us with concealment, but if they are charging us with concealment some evidence has got to be adduced showing what happened to those 98 copies as to whether Mr. Graubard has them, or whether they are on file with IDS, which their answers to the interrogatories indicate most of the documents were, or whether they are in the documents that were turned over to the representatives of the plaintiffs, their counsel and objectant's counsel.

The Court: You have that covered later on. I think you have a right to ask that. That is in 5.

Mr. Stratton: That is mostly covered on 5, but your Honor on this point—

The Court: This seems to me the sort of thing Mr. Meyer mentioned. If there are 100 copies in existence and they [fol. 338] have to say who had control of each copy in all this period of time, why it is a lot of work which seems to me makes very little difference.

Mr. Stratton: If they want to say they have no idea where those copies are with respect to the ones they don't know, that would be a good answer, and we accept it.

The Court: But if they have to answer they have got to do the tracing of these documents, that is the problem.

Let me ask as to Interrogatory 2, what is your objection to that?

Mr. Stratton: Before we pass Interrogatory 1, Judge Dawson, the point I am trying to make is that if they give

us an answer to a request for admission which we filed on Friday, after we studied their objections, if they will take a position with respect to that request for admission, both Interrogatory 1 and Interrogatory 5 are going to be largely irrelevant and we can focus on the—

The Court: I have got to pass on this particular document I have got before me now. That is the problem I have—

Mr. Stratton: What I am saying is this is the issue that [fol. 339] is going to be determinative of whether we have a broad case or whether we have a narrow case, because if we are going to have a narrow case and there is no charge that Mr. Kirby—

The Court: Actively concealed.

Mr. Stratton: Either actively concealed or whatever, the documents, but that everybody had access and wanted them and could ask for them and so forth, why, we are not going to have any trouble getting ready for this case in April.

The Court: You are not going to have any trouble getting ready for it anyway. You are going to be ready for it.

Mr. Stratton: We are going to be ready. We may have more trouble.

The Court: What is the objection to Interrogatory 2?

Mr. Updike: Interrogatory 2, as we read it, essentially asks the question as to what Mr. Kirby now knows or ever knew with respect to the existence of the documentation.

It seems to me that it calls for what is going to be one of the ultimate conclusions that the trier of the fact here is going to have to—

[fol. 340] The Court: That is not an objection to an Interrogatory.

Mr. Updike: It seemed to us it called upon us to go into the reasoning of Mr. Kirby's mind and if—

The Court: He is the one who is going to answer it, I take it. I mean—

Mr. Updike: He will have to answer it on the trial, I would expect.

The Court: Yes, but I mean you have got to answer what you say is in his mind. You said it in your complaint. Now, I can't see your objections to 2 make very much sense.

Now, Interrogatory 3, what is your objection to Interrogatory 3?

Mr. Updike: We have only objected to the latter part of it: "As to each such fact actually known to Mr. Kirby, give the date and describe the circumstances of each instance known to plaintiff when such fact came to Mr. Kirby's attention." And then it asks for the names and addresses of witnesses.

The Court: Well, you allege that certain facts did come to his attention, right?

Mr. Updike: That he knew or should have known, yes, sir.

[fol. 341] The Court: They want to know when the fact did come to his attention, who is the witness to it. What is objectionable about that? You allege he knew something. They want to know who knew something, who is the witness. What is objectionable about that?

Mr. Updike: It seems to us in reminding ourselves that this is an action against a man who was president and director of Alleghany, who is charged with having dealt with Alleghany in order to obtain property from Alleghany's own portfolio, that this is properly material which is strictly within Mr. Kirby's knowledge. We have answered the first part of it with respect to what we claim he knew or should have known, and we think it goes beyond the proper scope of an Interrogatory to go further than that in this sort of a case.

The Court: And your objection to 4 is exactly the same?

Mr. Updike: Yes, sir.

The Court: Now, what is your objection to 5?

Mr. Updike: Essentially our objection to 5 is this: Depositions have been taken, at least of Mr. Graubard up to now, and Mr. Meyer reminds me that Mr. Graubard was a man who cross-examined Mr. Pomerantz in the under-

[fol. 342] lying action; but it is perfectly clear that this

request calls for information which no one can reconstruct, and it seems to me that the only answer that can be given to it, if it is realistic, is that the plaintiff could not now tell with respect to these documents whether or not they had been made available for inspection.

It is our view that the substantial content of a good many of these documents is such that they could not have come to the attention of either the Referee himself, or Mr. Graubard or the other counsel listed without having been put into the case and having been marked in evidence, but they were never adduced in the sense that they were put into evidence before the Referee on that trial.

The Court: Then why can't you answer the Interrogatory then? This wants to know whether these documents were seen by any of the counsel in that case, or was it included in the groups of documents made available to them. Why can't you answer that? You can say "yes," "no," or "we don't know."

Mr. Updike: On that basis, we can, your Honor.

Mr. Kissam: Well, your Honor, I think they ought to go a little further. They are making the charge.

[fol. 343] The Court: I know.

Mr. Kissam: Suppose, for example, that Graubard or some other counsel saw documents and having seen them, in his judgment as counsel in charge of the case for his clients, he elected not to use those documents in his discretion. Now, they are made available, they are involved in the case which is settled. It seems to me that we ought to know that because if an attorney charged with responsibility of that trial elected not to use a document for reason of trial tactics or because he thought he had other proof, or because he thought the proof wasn't real or any other reason, that isn't any concealment.

The Court: That is the issue in the case, but all you are asking is whether these were made available to these people and Alleghany Corporation can say they were made available, they can say they were not made available, or say we don't know whether they were made available.

Mr. Kissam: I think you are going to get an answer where they are going to come in and say we just don't know.

The Court: If a witness doesn't know the answer, or [fol. 344] something, that is an answer, he says "I don't know."

Mr. Kissam: Perhaps if he doesn't know he shouldn't plead it in his complaint and make a charge.

Mr. Updike: That is an issue which we will have to come to, but I remind the Court that the burden, as we view it, was upon Mr. Kirby to produce them to the trier of the fact, not only the documents themselves, but the facts with respect to the settlement itself.

The Court: It seems to me it is a proper Interrogatory to answer, and they can answer it as it refers to any interrogatory.

What is the problem with Interrogatory 8?

Mr. Updike: The problem with regard to Interrogatory 8 is it takes something from the decision of the Referee which appears in that decision as a quotation, and as we think, as a quotation purporting to be a quotation from the Article of the Charter of Alleghany itself, and asks us where the Referee got the quotation from.

The Court: Do you know? Do you know where he got it from?

Mr. Updike: We haven't any idea.

The Court: Then you can say that.

Mr. Updike: Well, it puts the burden on us to research this thing.

[fol. 345] The Court: No, it says "State the source, if known to you, of this." You can say the source is this, or we don't know the source. That is an answer to the Interrogatory.

Mr. Updike: There is a second aspect to this to which Mr. Meyer just drew my attention. The last sentence of it, in any event, we think is improper in that it asks us to list and describe every legal text, case decision, book, paper, record, document or other writing known to plaintiff which existed prior to November 17, 1958, which contains the quoted material.

The Court: Do you know any?

Mr. Updike: I know of none except there is a reference

to one brief Mr. Stratton has made reference to in his affidavit here.

The Court: Yes, why not simply—I mean, you can't be compelled to say anything you don't know. You don't have to do a research job on the law for these people.

Mr. Updike: Thank you, as long as we don't have to do the research job we can answer the interrogatories, yes, sir.

The Court: That means at the time of trial you can't come up and say, well, this appeared in such and such a [fol. 346] document somewhere like that.

Mr. Updike: If we learn at a later time of any other areas, I would concede we were under a duty to inform our adversaries of it.

The Court: Yes. But it seems to me it is a perfectly proper question asked.

Mr. Kissam: But not about a week before the trial.

The Court: Now what is the objection to Interrogatory 9?

Mr. Updike: Well, this just, it seems to me, covers working papers with respect to the assembly of the materials that are involved in 1. Now, we have answered 1. We have given them the documentation themselves upon which we rely, and this merely calls for memoranda with respect to it, which would include the work that we have done in our office.

The Court: You don't have to give that information, but they have a right to know who has custody or control of any document. They may want to subpoena it.

Mr. Updike: Well, they have got that under 1. But this is papers, as I read it, with respect to memoranda, correspondence or other documents other than those docu- [fol. 347] ments previously described in answer to any interrogatory herein relied upon in answering any interrogatory herein.

Now, this calls for materials beyond anything that—

The Court: Well, what would that require you to say or do?

Mr. Updike: It seems to me it requires us to go through our correspondence files in our efforts to obtain copies of documents, our efforts to locate material bearing on this,

our efforts to get evidence that we can identify under 1. They are now asking for memoranda with respect to that.

The Court: What do you say as to that, Mr. Stratton?

Mr. Stratton: We don't want their working papers, your Honor, and we are perfectly happy to accept their definition of what their working papers are as they produce the documents, but we do want any other documents, whether of Alleghany, IDS—

The Court: They have given you a list of the documents.

Mr. Stratton: If there are no other such documents that is a perfectly adequate answer.

The Court: The documents described in 1 are the impor-
[fol. 348] tant documents.

Mr. Stratton: Those are the ones concealed, and whatever these other documents are would relate to all of the interrogatories. Some of the interrogatories go to other things than the documents concealed. They go to instances of Mr. Kirby's knowledge, they go to instances where Mr. Kirby—and they have answered today a list of instances where they say Mr. Kirby concealed things other than simply documents.

I have that answer before me, but they refer to a number of things that are not listed in Interrogatory 1, and those are the papers that we want to get with this interrogatory. We don't want their working papers at all.

Mr. Updike: Judge Dawson, this is broader than that. Judge, you just ruled that we have to answer specific additional interrogatories and this Interrogatory 9 goes not only to the material that we have given in answer to Interrogatory 1, but it goes in addition to all of the documents, all of the cross-references, all of the substantial facts that we will have to come up with in answer to some of the interrogatories as to which your Honor has just ruled.

Mr. Stratton: May I direct your Honor's attention to
[fol. 349] their answer served on us today, to interrogatories to which they did not object. This is the answer to Interrogatory 7, at the bottom of that page.

Mr. Kissam: Judge, if I can say something, we took this case as your case.

The Court: I know.

Mr. Kissam: We thought we were following a rather good precedent. It might have a heart-rendering reminiscence on your part when you read the citation.

The Court: You read that in your brief.

Mr. Kissam: If they are only fussing about work papers they have got a simple answer.

Mr. Stratton: Now, your Honor, that information, the answer to the interrogatory doesn't refer to any documents at all.

The Court: They have given you the answer to the facts. Why do you need the documents?

Mr. Stratton: They are asserting the facts, but we don't know what the evidence is that is supporting the facts. We don't know the names of the witnesses, the description of the documents, all of which we have a right to.

The Court: There is no description of the documents [fol. 350] there.

Mr. Stratton: No, but this information may be contained in documents; I don't know. This is just a summary of what the fact situation is, but we do want to know what documents they draw this information from, what witnesses.

The Court: There again you run into the question of work product.

Mr. Kissam: We are going around that. If they want to say there is nothing except contained in the work product, that would be a complete answer. The mere fact they don't want to say that would let you think there must be some documents which couldn't be classified as work products and certainly we are entitled to know what they are.

The Court: I think if they answer the interrogatories the way they are drawn—they are very thoroughly drawn—you will get all the information you need.

My ruling is I sustain the objection to the underlying part of Interrogatory 1, except that they shall state who now has custody of any such paper, records or document.

I overrule the objection to Interrogatory 2.

[fol. 351] I overrule the objection to Interrogatory 4.

I overrule the objection to Interrogatory 5.

I overrule the objection to Interrogatory 8.

I sustain the objection to Interrogatory 9.

How soon now can you get these answers in?

Mr. Meyer: Your Honor, with respect to your ruling on Interrogatory 1, if we have already given the location such as Alleghany or IDS or SEC, is that a sufficient definition—

The Court: Who now has the documents?

Mr. Meyer: Yes, that is the way we now understand it.

Mr. Updike: If we can answer the Interrogatory by saying "Refer to the prior answer and state the"—

The Court: Yes.

Mr. Stratton: I believe they have already answered it in their prior answer, your Honor. A number of these documents though we will be addressing a Rule 34 motion to. In fact, I drafted it even before I got the answer to their interrogatories, just leave a space in the schedule to insert the documents in answer to 1, but I don't understand when they say location, what they mean, and when they say the location is IDS and SEC, whether they mean [fol. 352] they do not have custody and control of the copy of that document, because if they do a simple Rule 34 motion would reach it, and if they do not I will have to go to IDS and subpoena them.

The Court: Yes, I think you will have to state who has custody; that is preliminary to a 34 motion.

Mr. Updike: That is the way I understood your ruling with respect to Interrogatory 1.

The Court: That is right. I mean you state now who has custody. If you have already stated it, all right, but this is hardly a statement.

How soon do these interrogatories get answered?

Mr. Stratton: They are ten days late now, your Honor.

The Court: All right. Ten days from now?

Mr. Updike: Yes, sir. We can do that. We will have to do that.

The Court: These interrogatories will be answered within ten days from today, and the case will go on trial on April 1st.

Mr. Stratton: That is 20 days after we had hoped to get answers.

Mr. Loeffler: 21 days.

Mr. Stratton: 21 days?

[fol. 353] The Court: You will be all right.

Mr. Updike: This period of time, your Honor, is merely—your Honor has ruled, thank you.

Mr. Kissam: Your Honor, you made a reference to the brief. I have to tell you that this was prepared by Mr. Stratton and by Mr. Genovese and the others, and I read it with great interest because it was excellent.

The Court: So did I.

Mr. Stratton: May I say that it is based largely on Mr. Kissam's thinking and suggestions and ideas.

The Court: I thought it was based upon my previous opinions.

Mr. Loeffler: We did have—there is another matter, your Honor.

The Court: What is that?

Mr. Loeffler: That is the question of time of the defendants to answer the interrogatories propounded by plaintiff, which we have been working on most diligently since we received their interrogatories, and we have Mr. McCann and the accountant working day and night until after midnight every night, going through the files of Mr. Kirby. But we have still run into a purely physical time problem on being able to search all of these files because the interrogatories cover not merely files during the period 1958 [fol. 354] through 1950, but also through December 30, 1959, and Mr. Kirby's files were not arranged in the most methodical way. They were basically alphabetical which gives little help, so we have a time problem on actually simply covering them and getting these answers together, and then reviewing them with Mr. Kirby who is presently Kenards, South Carolina, so we will need time in which to file our answer.

The Court: Have you asked for an extension of time?

Mr. Loeffler: No. Since the other side has taken 21 days in which their answer was due, I would request that.

The Court: Why don't we say ten days from now for your answers and ten days for these answers.

Mr. Loeffler: Because that gives them substantially more time, your Honor. Not merely that, your Honor, we will give it to them as soon as we can get them.

The Court: How about ten days, isn't that time enough?

Mr. Loeffler: I don't think we can, your Honor, as a physical matter. After we have gone through all these files we have to review them with Mr. Kirby.

The Court: Tell him to come up here.

[fol. 355] Mr. Loeffler: I think he will be, but that isn't going to solve our problem.

The Court: I am not interested in Mr. Kirby going hunting down in Camden; that is not any excuse. If he is a defendant in this case, if he is interested, he should come up here.

Mr. Stratton: Ten days from Friday is only a four-day extension.

The Court: Ten days from Friday then. Ten days from Friday for the defendants' answers to interrogatories. Ten days from now for the plaintiff's answers.

Mr. Kissam: We have—at least I have one other thing which I would like your help on. Mr. Bauman is pressing that we go on next Tuesday. Now, I didn't get the time that I spoke to you about. We held the hearings between Christmas and New Year's, and right after New Year's, we made arrangements and that went forward and there was no delay whatever.

Now, I told him that I had this trial which was presently on before Judge Silverman in the State Court. It is a short case, and I asked him if he wouldn't postpone Mr. Daly's examination and that after that I would make no application whatever because I committed myself to do nothing [fol. 356] but this case through April, and I am just finishing this case and I may even meet a schedule, but I told him about it, and asked him would he make it at the conclusion of this case and he said he wouldn't, he wanted to go on next Tuesday.

Now, I can't prophesy, so I told him I was going to make an application to you today which, of course, creates no problem on his part.

The Court: What do you want? Do you want the deposition when your present case is finished?

Mr. Kissam: I want to go on with the deposition one day after I am through with this trial. The trial may be through by Tuesday.

The Court: Is that all right with everybody?

Mr. Meyer: No, it is not. The deposition, as I understand, is our deposition. It is the plaintiff's deposition that would be taken first. Undoubtedly Mr. Kissam would like to cross-examine, but the only reason it is not is the time table. We have four witnesses to take in Palm Beach; we have Mr. Shipman to take up here and Mr. Daly to take up here, and I understand defendants also want to take the deposition of Mr. Fitzsimmons, which may be in Minneapolis or elsewhere, and it seems to me that the Master is only—I am saying this in his defense—he has taken [fol. 357] the position that you have set the case for trial on April 1, and that he is jolly well going to have these depositions wound up in proper time so that you can do it.

The Court: I think you can go ahead or, if not, you can have Mr. Genovese—

Mr. Kissam: Here is the problem. I made arrangements now; I have a matter with Judge Dooling. This is before he became ill.

The Court: Did you send him to the hospital?

Mr. Kissam: Now, I didn't. Fortunately, I don't think he is as ill as people thought in the first instance.

The Court: He had a heart attack.

Mr. Kissam: I don't think he had a heart attack. I think he is just really resting, but you called him up and told him about it and he was very cooperative and put that over. All I am suggesting—there used to be a thing called a legal excuse, and what I am asking for is a maximum of possibly two days difference. I don't even know that we need it.

The Court: If you are actually on trial in a case, I suppose you have got a legal excuse on the deposition.

[fol. 358] Mr. Kissam: That is correct.

The Court: But you haven't got a legal excuse if your

case ends on Monday to take Tuesday off. Lawyers are supposed to work all the time.

Mr. Kissam: No, I am not asking for that. In fact, I am even hoping it won't be necessary to ask for anything. We have been on trial for two days. It is a non-jury case. It conceivably could end this week, but I am anticipating this. I don't want to come back and bother you again. What I would like to have you do, if you will, is to rule that the deposition of Mr. Daly will commence either on the 22nd, as now scheduled by the Master, or if I am on trial that day, the very day after my trial is completed. This trial can't go on more than a couple of days next week at the most.

Mr. Updike: Judge Dawson, normally we would be happy to accommodate Mr. Kissam. The situation that is confronting us here really is that you have made the ruling that you have today. We don't want to be in a jam with respect to this case. Now, because of the fact Mr. Carter has been assigned, Number 1, before a Judge in the State Court in another case that he thought he would have tried and have behind him by now, and he still is Number 1.

[fol. 359] The Court: You are the Number 1 man from his firm, though, so you will be there.

Mr. Updike: We are going forward with the deposition in spite of that fact.

Mr. Kissam: Judge, excuse me, we have no problem.

The Court: I am not going to rule on what the Special Master should do. I do say if you are actually engaged in a trial on the date of the deposition, I think you can present that as a legal excuse to the Master.

Mr. Kissam: He said he won't recognize it and I have to take it up with you.

The Court: Come up at that time and tell me. You haven't got a legal excuse now. Maybe you will have on that day.

Mr. Kissam: All right.

The Court: But you have also got an associate who can handle the thing.

Mr. Kissam: I think you have got this problem: In this

case, as you know, Mr. McDonald and I have been spelling one another and between the two of us I don't think we have wasted very much time. Mr. McDonald—

The Court: I think everybody has wasted time in this case, both sides.

[fol. 360] Mr. Kissam: Any time the plaintiff wants to discontinue we will consent on reasonable terms.

Mr. Meyer: We aren't sitting this week to accommodate Mr. Kissam and Mr. Phillips. We were scheduled to sit today, tomorrow, Thursday and Friday. And we aren't sitting this week to accommodate both of them in this instance.

Mr. Stratton: Your Honor, let me attract your attention to the fact that when we first talked about their amending this complaint, one of our problems was that Mr. Graubard, who was on the stand and now off, and Mr. Daly, too, were responsible for the conduct of that earlier litigation. They were on different sides of it. To the extent that answers to interrogatories are going to relate to the field of their information, as we were told at the time the amendment was permitted, we are going to be completely in the blind as to what areas should be gone into with these gentlemen.

The Court: Are you going to be ready for trial? That is all I am interested in.

Mr. Stratton: We are going to be ready.

The Court: If there is any doubt, I will put the case over to next year, but if not, do the best you can.

[fol. 361] Mr. Kissam: The plaintiff took three months with a simple amendment and it seems to me, Judge, when we have a Master who is very diligent—and not being critical about him—but when he notifies me in advance he will not recognize what I think is a legal excuse and he says go see Judge Dawson—

The Court: When you are actually on trial, that is probably the legal excuse in the taking of a deposition. That is my feeling about it. But you are not actually on trial as of next Tuesday yet, so—

Mr. Kissam: That is correct, and it is my sincere hope I won't be for many reasons.

The Court: I think there may be no problem.

Mr. Kissam: But I am anticipating it in case there is. I can see we can drag a day or two over there, and it might be Wednesday or Thursday. It won't be long, I assure you.

The Court: Don't drag it out. Win that case, too; keep your record pure.

I think that disposes of that, and I will tell the government they can't go ahead with the Kennecott Copper antitrust case this spring.

Mr. Kissam: They are probably delighted.

The Court: I don't know—off the record.

(Discussion off the record.)

[fol. 362]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR., and FRED M. KIRBY, Defendants.

ANSWERS TO INTERROGATORIES—Filed January 17, 1963

Plaintiff Alleghany Corporation by Bernard C. McGuire, its Assistant Secretary, in answer to defendants' (other than Phillips) interrogatories dated December 21, 1962, states upon information and belief:

[File endorsement omitted]

I. *As to Interrogatories 1(a), (b) and (c):*

Document	*Location*	*Date Created*
A. *Reports of Joseph Froggatt & Co., Inc.* (Annual and Special Independent Actuarial Valuations, Opinions and Projections)		
1. *Annual Reports* for 1943, 1944	IDS	On or before 5/ 1/45
1945	"	" " " 4/26/46
1946	"	" " " 5/ 6/47
1947	"	" " " 5/ 3/48
1948	Alleghany	" " " 4/29/49
1949	"	" " " 5/22/50
1950	IDS	" " " 5/16/51
1951	Alleghany	" " " 4/16/52
2. *Special Reports*	IDS	" " " 3/31/48
	"	" " " 3/25/49
(Re Valuation of ISC)	Alleghany	" " " 4/ 7/49

[fol. 363]

B. *Reports of George Rossetter & Co.* (Annual Audits of IDS, ISA, ISTG, wholly-owned U.S. subsidiaries)		
1. For the Year ended December 31, 1947	IDS	Presently Unknown

Document	*Location*	*Date Created*
2. For the Year ended December 31, 1948		
(Re IDS)	Alleghany	On or Before 4/20/49
(Re ISA)	"	" " " 2/23/49
(Re Subs)	"	" " " 3/31/49
3. For the Year ended December 31, 1949		
(IDS)	Alleghany	On or before 3/30/50
(Re ISA)	IDS	Presently Unknown
(Re Subs)	Alleghany	On or before 3/27/50
(Re ISTG)	"	" " " 4/ 3/50
4. For the three Years ended December 31, 1948		
(Re ISA)	Alleghany	On or Before 2/23/49
5. "Auditor's Report": Financial Statements for the three years ended December 31, 1950 (for use in connection with Registration Statement on Form N-8B-4 under Investment Company Act of 1940	IDS	Presently Unknown

Document	*Location*	*Date Created*
C. *Reports of Peat, Marwick, Mitchell & Co.* (Annual Audits of IDS, ISA, ISTG, wholly-owned subsidiaries)		
1. For the Year ended December 31, 1950	IDS	Presently Unknown
[fol. 364]		
D. *Reports of Millar, MacDonald & Co.* (Annual Audits of ISC)		
1. For the Year ended December 31, 1947	IDS	Presently Unknown
2. For the Year ended December 31, 1948	"	On or before 2/ 9/49
3. For the Year ended December 31, 1949	Alleghany	" " " 2/ 7/50
4. For the Year ended December 31, 1950	IDS	Presently Unknown
E. *State of Minnesota, Department of Commerce, Banking Division, Report of Examination of IDS, Minneapolis, Minnesota, as at the close of business—*		

Document	*Location*	*Date Created*
1. For the Year ended December 31, 1948	Alleghany	On or mefore 5/ 2/49
2. For the Year ended December 31, 1949	"	" " " 4/28/50
3. For the Year ended December 31, 1950	IDS	Presently Unknown
F. *"Investors Diversified Services, Inc., Summary of Operations" (Including Exhibits and Schedules)*•		
1. At January 31, 1949	IDS	On or before 4/12/49
2. At February 28, 1949	"	" " " 4/12/49
3. At March 31, 1949	"	" " " 4/12/49
[fol. 365]		
4. At April 30, 1949	IDS	On or before 5/20/49
5. At May 31, 1949	"	" " " 6/22/49
6. At June 30, 1949	"	" " " 9/ 9/49
7. At July 31, 1949	"	" " " 9/15/49
8. At August 31, 1949	"	" " " 9/29/49
9. At September 30, 1949	"	" " " 10/24/49

• What are apparently excerpts from "Summary of Operations" statements are found in Alleghany's files per letters dated July 26, 1954 (N. B. Wagg to Purcell) and July 27, 1954 (Purcell to R. R. Young) as follows: Condensed income statement for IDS by quarters for the years 1949 and 1950; Summary of Operations for the year 1950 showing income statement for that year and for 1949 and also a comparison to a projection for the year 1950.

Document	*Location*	*Date Created*
10. At October 31, 1949	IDS	On or before 11/25/49
11. At November 30, 1949	"	" " " 12/28/49
13. At January 31, 1950	"	" " " 4/12/50
14. At February 28, 1950	"	" " " 4/12/50
15. At March 31, 1950	"	" " " 4/24/50
16. At April 30, 1950	"	" " " 5/24/50
17. At May 31, 1950	"	" " " 6/23/50
18. At June 30, 1950	"	" " " 7/31/50
19. At July 31, 1950	"	" " " 8/29/50
20. At August 31, 1950	"	" " " 9/26/50
21. At September 30, 1950	"	" " " 10/25/50
22. At October 31, 1950	"	" " " 11/27/50
23. At November 30, 1950	"	" " " 12/26/50
24. At December 31, 1950	"	" " " 1/25/51

Document	Location	Date Created
G. *"Investors Syndicate (after March 13, 1949, "IDS), Minneapolis, Minnesota, Projected Condensed Profit and Loss Statement • • • including the Net Income of Subsidiaries before Profit and Loss from Sale of Investments and Income taxes"*		
1. For the Years 1947 through 1956 (on assumed basis of 3% stretchout and 1% surrender factor)	IDS	On or about 1/ 1/47
[fol. 366] 2. For the Years 1947 through 1956	IDS	On or about 1/ 1/47
3. For the Years 1947 through 1951 (on basis of revised reserve schedules, amortization of mortgage premiums and increased capital)	"	" " " 1/ 1/47

Document	*Location*	*Date Created*
4. For the Years 1947 and 1948 (by months)	IDS	On or about 1/ 1/47
5. For the Years 1948 through 1952 (revised April 29, 1948)	"	" " " 1/ 1/48 (as revised on or about 4/29/48)
6. For the Year 1948 (by months) (revised April 29, 1948)	"	On or about 1/ 1/48 (as revised on or about 4/29/48)
7. For the Years 1949 through 1953	"	December, 1948
8. For the Year 1949 (by months)	"	On or about 4/12/49
9. For the Years 1950 through 1954	"	On or about 1/ 1/50
10. For the Year 1950 (by months)	"	" " " 1/ 1/49
11. For the Year 1950 (by months) (as revised August 29, 1950)	"	" " " 1/ 1/50 (as revised on or about 8/29/50)

Document	*Location*	*Date Created*
H. *"Investors Syndicate of America, Inc., Minneapolis, Minnesota, Projected Income Statement* • • • (.)		
1. For Years 1949 through 1953 (before profit or loss from sale of investments and income taxes)	IDS	On or about 1/ 1/49
[fol. 367]		
2. For the Year 1949 (by months)	"	" " " 1/ 1/49
I. *"Assumptions Used in Calculating Projected Condensed Net Income Statement* • • • (.) *(including the net income of subsidiaries before profit or loss from sale of investments or income taxes)*		
1. For the Years 1949 through 1953	"	December, 1948
2. For the Years 1950 through 1954	"	On or about 1/ 1/50

Document	*Location*	*Date Created*
3. For the Years 1951 through 1955	IDS	On or about 1/ 1/51
J. *Assumptions Used in Calculating Projected Condensed Net Income Statement (ISA) for the Years 1949 through 1953*	"	" " " 1/ 1/49
K. *ISA Summary of Operations 8 Months ended August 31, 1949*	"	In or about 9/19/49
L. *ISC Summary of Operations 8 Months ended August 31, 1949*	"	" " " "
M. *Detailed Comparative Balance Sheet and Statement of Net Income and Earned Surplus (IDS) for the Period Ended August 31, 1949*	"	" " " "
N. *Bear, Stearns & Co. Report*	Alleghany	10/28/48
O. *Reports by Charles Shipman*	Alleghany	12/18/48
	SEC	12/31/48
	SEC	1/ 4/49
	Alleghany	4/12/49

Document	*Location*	*Date Created*
[fol. 368]		
P. *Saunders, Stiver & Co. Report*	SEC	3/15/49
Q. *IDS, Inc., et al., SEC Docket No. 812-596*		
1. Testimony of Earl E. Crabb		
2. Testimony of R. W. Purcell		
3. Testimony of B. C. Gamble		
4. Exhibits in case		
R. *Court Records, G. Robert Herberger* v. *Bertin C. Gamble, U.S.D.C. Minn., 4th Div. Civ. No. 4292*		
1. Court File	Ct. Clerk	Presently Unknown
2. Depositions (including Purcell)	Ct. Reporter	Presently Unknown
S. *Annual Reports*		
1. ISC 1948	IDS	Presently Unknown
1949	Alleghany	" "
1950	"	" "
2. ISTG 1948	"	" "
1949	"	" "
1950	"	" "
T. *Correspondence*		
1. Letters (3) Purcell to H. K. Bradford	"	6/19/49

[fol. 369]

II. As to Interrogatory 3:

(1) The full measure of IDS' liability to its certificate holders was specified in its certificates. Under its certificates IDS agreed to maintain qualified assets in amounts ranging from 100% to 110% of the liabilities specified in its certificates. For the year ending December 31, 1948, IDS had net certificate liabilities of $232,524,217.26 against which it was required to maintain net assets of $253,149,-711.19 and IDS had qualified assets in excess of such required amount;

(2) IDS was a soundly-conceived enterprise whose operations were reflected in great detail in the audit reports of Rossetter and the reports of the Minnesota State Bank Examiners and whose future operating results had been and were being conservatively forecast both by internal projections and actuarial projections by Froggatt;

(3) IDS had met its obligations with respect to certificate maturities for fifty-five years;

(4) In 1948 IDS had earned an amount equal to 4.916% of the existing mean installment certificate reserves; an earnings rate of only $4.864 would be required on the dollar amount of reserves maintained by IDS as of December 31, 1948, to meet its maturities and other future requirements on its certificates then remaining outstanding. The actuarial extrapolation based on experience to December 31, 1948 indicated a projected five-year earnings rate of 5.845%;

(5) The underwriting income to IDS from ISA, and from the Funds, was continuing to show a strong expanding trend. ISA, from its inception in 1940 had grown by December, 1948 to a point where its face amount certificates outstanding exceeded those of IDS itself. Investors Mutual, Inc., from its inception in 1940, had grown by December,

1948 to a point where it was the third largest mutual fund in the United States. The gross income to IDS from underwriting fees received from ISA and the Funds increased from $7,036,801.87 in 1948 to $7,400,000 for 1949;

(6) Neither IDS' balance sheet, nor its earnings statement reflected the fact that ISC had actually received by December 31, 1948 underwriting income of $1,063,453.79 which was not reflected in ISC's surplus as brought into the IDS balance sheet and earnings statement.

(7) The increase in mortgage operational profit of IDS in 1949 was the largest single factor in the improved results for 1949. IDS mortgage operations, which had shown a net loss of approximately $700,000 in 1948, produced a [fol. 370] net loss of approximately $700,000 in 1948, produced a net income in 1949 of $1,956,019 (a year-to-year improvement of approximately $2,656,019). A further income from such operations actually received in 1949, amounting to $717,358, was deferred, after deducting $152,000 for 1949 income taxes applicable thereto, into income for 1950. This deferral diminished 1949 income, and increased 1950 income, by $565,358;

(8) After taking into account only business which was present on the books of IDS in the forepart of February, 1950, the mortgage department forecast a gross income from mortgage operations alone (excluding interest) of $8,315,000, with a net income of $4,897,500, equivalent to approximately $16.00 per IDS share;

(9) The forecast for sales of Fund securities indicated $52,000,000 for 1950, as compared with $42,000,000 for 1949, with consequent increases to IDS in net income from underwriting and from investment advisory fees;

(10) The forecast for sales of certificates of ISA was an increase of approximately $10,000,000 in face amount, with consequent increases to IDS in net income from underwriting and from investment adviser fees;

(11) The organization of Investors Mutual of Canada, Ltd., had been completed and sales of shares of that company were about to begin;

(12) The following information as to the IDS earnings for 1949:

(a) IDS had elected to defer net income of $565,358 received in 1949;

(b) The Income Statement of IDS for 1949 did not give effect to net income of ISC of $146,231.85;

(c) The net income of IDS for 1949 was diminished by:

(i) a reserve for unrealized loss on exchange conversion of Canadian assets in the amount of	$ 113,024.12
(ii) a reserve for unrealized losses on securities in the amount of	258,427.24
(iii) a reserve for unrealized losses on mortgages in the amount of	325,000.00
[fol. 371] (iv) a reserve for income taxes with respect to the item of deferred income in paragraph (a) above in the amount of	152,000.00
(v) a reserve for future contingent liabilities with respect to its certificates in the amount of	155,000.00
Total	$1,003,451.36;

(d) The amounts referred to in sections a. through c. of this subparagraph totaling $1,715,041.21 were in addition to a stated net income before taxes of $1,365,485.29.

(13) The following information as to the IDS balance sheet as of December 31, 1949:

(a) The balance sheet of IDS did not give effect to the net interest of IDS in surplus items of over $2,000,000 shown on the respective balance sheets of its subsidiaries;

(b) As of December 31, 1949 IDS was required to maintain on deposit, in various states, qualified assets of $254,171,648.26 and on that date IDS had $258,145,174.53 of qualified assets on deposit;

(c) As of December 31, 1949 IDS had net certificate liabilities of $236,157,586.53, and assets qualified as reserves in accordance with the terms of its certificates in excess of $257,006,819.32;

(d) As of December 31, 1949 IDS had "Reserves to stabilize financing costs" of $5,086,617.26 and a "Special reserve" of $3,500,000, in addition to its other certificate reserves, which were shareholder equity items, or surplus, if not used for payments on certificates;

(e) On December 31, 1949 the total cash surrender value of all of IDS' outstanding certificates (after giving effect to exchange discount on Canadian liabilities) was $241,050,531.67, and IDS had assets in excess of $260,000,000 to meet such obligations.

(14) IDS had projected its net income, before taxes and investment transactions, for 1950 at $7,140,850; for 1951 at $4,607,800; for 1952 at $3,860,300; for 1953 at $4,410,500; and for 1954 at $5,265,750;

[fol. 372] (15) Froggatt had projected that IDS would be able to meet its certificate liabilities on an income no greater than that realized in 1948;

(16) Froggatt had advised that an earnings rate of 4.864% on the dollar mount of IDS reserves at December 31, 1948 was required to meet its maturities. Frog-

gatt forecast, based on experience to December 31, 1948, a five-year earnings rate of 5.845%;

(17) A. L. Stiver had been employed as an independent expert to evaluate IDS, and Stiver, in his written report of March 15, 1949, had strongly recommended to Alleghany the acquisition of IDS from Gamble;

(18) Froggatt, based upon its study of IDS for the years 1940-1948, forecast that IDS had, and would have, reserves and earnings in an amount in excess of the sum required to meet its certificate requirements;

(19) All of the facts reflected in the results of operations for 1949 of IDS and its subsidiaries as reported by both the internal auditors of IDS and its independent certified public accounts;

(20) All of the facts reflected in the 1949 monthly and cumulative IDS Summaries of Operations measuring actual against projected results; and the monthly and cumulative Summaries of Operations measuring actual against projected results for the months of January, February and March 1950.

III. *As to Interrogatory 4:*

(1) The $8.1453 price at which defendant Kirby accepted the 1950 exchange offer for IDS shares was not the higher of cost or market for said shares. Defendant Kirby could not have accumulated from open market purchases a block of 24,062 IDS Class A shares at prices of $8.1453 or less per share.

(2) The $8.1453 price per share at which Kirby accepted the 1950 exchange offer for IDS shares was not the actual cost of said shares.

(3) ISC was not sold by IDS, the contract for sale at $1,600,000.00 having been cancelled on the initiative of the Alleghany management which possessed an independent valuation of $2,500,000 to $5,200,000 for said company.

[fol. 373] IV. *As to Interrogatory 6:*

(1) *Zenn* v. *Anzalone* (State) Stipulation of Settlement dated July 25, 1955 and signed by David W. Wallace, attorney-in-fact for defendants * * * Allan P. Kirby.

(2) Letter dated February , 1958 addressed to Allan P. Kirby and Mrs. Anita O'Keefe Young, etc. prepared on Mr. Kirby's behalf for signature by John D. Murchison and Clint W. Murchison, Jr., unsigned.

(3) Letter dated June 30, 1958, from Lord, Day & Lord and Satterlee, Warfield & Stephens to Hon. Robert J. Fitzsimmons.

(4) *Zenn* v. *Anzalone (State)* Transcript of Proceedings June 20, 1958, pp. 58, 83-85.

(5) *Zenn* v. *Anzalone (State)* Report of Referee dated November 17, 1958.

(6) *Breswick* v. *Briggs,* Report of Special Master dated November 17, 1958, pp. 4, 6, 9.

(7) *Breswick* v. *Briggs,* Affidavit of Thomas F. Daly dated March 19, 1956, pp. 14, 15 and p. 8 of Exhibit H thereto.

V. *As to Interrogatory 7:*

(1) Mr. Kirby's failure to testify both before the close of the record before the Referee in *Zenn* v. *Anzalone (State)* or before the New York Supreme Court or this Court, or to make any statement to the New York Supreme Court or this Court, with respect to or reflecting the facts heretofore set forth in this answer to Interrogatories.

(2) The failure of Mr. Kirby to disclose or cause to be disclosed to the Referee, Special Master, this Court or the New York Supreme Court, the fact of and the amount of the payments in settlement of claims asserted by Robert G. Herberger and Jack Moss.

(3) The failure of Mr. Kirby to notify or cause the notification of this Court of the New York Supreme Court of the error contained in the Referee's Report in *Zenn* v. *Anzalone (State)* with respect to the absence of a quorum and the effect thereof at the December 6th meeting of the 1949 meeting of the Alleghany board of directors.

[fol. 374] (4) The authorization by Mr. Kirby of discussions by Charles T. Ireland with Randolph Phillips and the offer of employment for Phillips during said negotiations. And the failure of Mr. Kirby either himself or by representatives to inform this Court or the New York Supreme Court of the negotiations conducted on his behalf by Charles T. Ireland with Randolph Phillips and the discussions had in connection therewith, between September 27, 1959 and December 30, 1959.

(5) The severance contract with David W. Wallace.

(6) The failure to disclose to this Court and the New York Supreme Court the fact of or the content of the letter of Lord, Day & Lord dated October 22, 1959.

(7) The retainer of new counsel in December 1959 as set forth in the complaint herein.

(8) Mr. Kirby's delay in notifying Alleghany and IDS management and directors of his selections for the IDS slate of directors for 1960 until he was leaving for Europe immediately preceding the annual meeting of IDS.

(9) Mr. Kirby's failure to disclose or cause to be disclosed to this Court or the New York Supreme Court the secret arrangements alleged in paragraphs 44 through 47 of the Amended Complaint herein.

Bernard C. McGuire.

[fol. 375] *Duly sworn to by Bernard C. McGuire, jurat omitted in printing.*

[fol. 376] Affidavit of service (omitted in printing).

[fol. 377]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR., and FRED M. KIRBY, Defendants.

FURTHER ANSWERS TO INTERROGATORIES—
Filed January 29, 1963

Plaintiff Alleghany Corporation by Bernard C. McGuire, its Assistant Secretary, in answer to defendants' (other than Phillips)' interrogatories dated December 21, 1962, states upon information and belief:

I. *As to Interrogatory 2:*

Plaintiff contends that Allan P. Kirby knew of the documents listed below in Column 1. The events and documents which reflect such knowledge on the part of Mr. Kirby are listed below in Column 2.

[File endorsement omitted]

Documents Listed In Answer to Interrogatory 1	*Events And Documents Which Establish Knowledge*
A. *Reports of Joseph Froggatt & Co., Inc.* (Annual and Special Independent Actuarial Valuations, Opinions and Projections)	Shipman & Stiver Reports listed below (¶¶ O. & P.)
1. Annual Reports for 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950 and 1951	Rossetter Reports listed below (¶ B.)
[fol. 378]	
B. *Reports of George Rossetter & Co.*	Shipman Report of April 12, 1949, Gamble letter to Shipman April 2, 1949.
1. For the Year ended December 31, 1947	
2. For the Year ended December 31, 1948 (Re IDS) (Re ISA) (Re Subs)	
3. For the Year ended December 31, 1949 (IDS) (Re ISA) (Re Subs) (Re ISTG)	
4. For the three Years ended December 31, 1948 (Re ISA)	

Documents Listed In Answer to Interrogatory 1	*Events And Documents Which Establish Knowledge*
D. *Reports of Millar, MacDonald & Co.* (Annual Audits of ISC)	Rossetter Reports listed above (¶ B.)
1. For the Year ended December 31, 1947	
2. For the Year ended December 31, 1948	
3. For the Year ended December 31, 1949	
4. For the Year ended December 31, 1950	
G. *"Investors Syndicate (after March 31, 1949, "I D S"), Minneapolis, Minnesota, Projected Condensed Profit and Loss Statement • • • including the Net Income of Subsidiaries before Profit and Loss from Sale of Investments and Income taxes"*	Shipman & Stiver Reports listed below (¶¶ O. & P.)
1. For the Years 1947 through 1956 (on assumed basis of 3% stretchout and 1% surrender factor)	
2. For the Years 1947 through 1956	

Documents Listed In Answer to Interrogatory 1

Events And Documents Which Establish Knowledge

[fol. 379]

3. For the Years 1947 through 1951 (on basis of revised reserve schedules, amortization of mortgage premiums and increased capital)
4. For the Years 1947 and 1948 (by months)
5. For the Years 1948 through 1952 (revised April 29, 1948)
6. For the Year 1948 (by months) (revised April 29, 1948)
7. For the Years 1949 through 1953
8. For the Year 1949 (by months)
9. For the Years 1950 through 1954
10. For the Year 1950 (by months)
11. For the Year 1950 (by months) (as revised August 29, 1950)

Documents Listed In Answer to Interrogatory 1	*Events And Documents Which Establish Knowledge*
H. *"Investors Syndicate of America, Inc., Minneapolis, Minnesota, Projected Income Statement* • • • (.)	Shipman & Stiver Reports, listed below (¶¶ O. & P.)
1. For Years 1949 through 1953 (before profit or loss from sale of investments and income taxes)	
2. For the Year 1949 (by months)	
O. *Reports by Charles Shipman:*	Letter Allan P. Kirby to Robert W. Purcell 12/20/48.
December 18, 1948 December 31, 1948 January 4, 1949 April 12, 1949	Robert R. Young letter to Alleghany Board 4/19/49. Minutes Alleghany Board of Directors March 2, 1949, March 24, 1949 and April 21, 1949
[fol. 380]	
P. *Saunders, Stiver & Co. Report:*	Robert R. Young, letter to Alleghany Board 4/19/49.
March 15, 1949	Minutes Alleghany Board of Directors March 2, 1949, March 24, 1949 and April 21, 1949
Q. *IDS, Inc. et al., SEC Docket No. 812-596*	Minutes of the Board of Directors Meeting of Alleghany August 16, 1949.
1. Testimony of Earl E. Crabb	Purcell letter to Young and Kirby February 11, 1950

Documents Listed In Answer to Interrogatory 1		*Events And Documents Which Establish Knowledge*
2. Testimony of R. W. Purcell		
3. Testimony of B. C. Gamble		
4. Exhibits in case		
S. *Annual Reports*		Shipman Reports (¶ O. above) Letter Bertin C. Gamble to Robert W. Purcell April 6, 1949
1. ISC	1948 1949 1950	
2. ISTG	1948 1949 1950	

In addition, the following facts and circumstances support plaintiff's contention that Kirby knew or should have known of each of the documents listed in answer to interrogatory 1:

(A) His membership on the Alleghany Board of Directors and his presence at meetings of the Alleghany Board of Directors on the following dates:

1. March 2, 1949
2. April 21, 1949
3. May 17, 1949
4. September 15, 1949
5. December 6, 1949
6. February 24, 1950

(B) His position as a member of Alleghany's Executive Committee and the knowledge derived from the meetings [fol. 381] of that committee on the following dates:

1. April 4, 1949
2. April 11, 1949
3. April 27, 1949
4. April 28, 1949

(C) Conversations and discussions referred to or implied in letters and other documents, as follows:

1. Purcell's testimony in SEC proceedings, Docket 812-596.
2. SEC Docket 812-596 Exhibit D-4.
3. SEC Docket 812-596 Exhibit D-5b.
4. Purcell deposition, *Herberger* v. *Gamble*.
5. The testimony of Robert R. Young and Robert W. Purcell in *Zenn* v. *Anzalone*.
6. Letter Bertin C. Gamble to Charles Shipman April 2, 1949.
7. Letter Charles Shipman to Bertin C. Gamble April 6, 1949.
8. White and Case opinion letter of April 13, 1949.
9. Contract between Bertin C. Gamble and Alleghany dated April 25, 1949.
10. Letter Robert R. Young to Alleghany Board April 19, 1949.
11. Letter Robert W. Purcell to Young and Allan P. Kirby February 11, 1950.
12. Annual Report of Alleghany for 1949.
13. Annual Reports of I.D.S. for 1947, 1948 and 1949.

(D) Conversations with Charles Shipman, Robert R. Young, Robert W. Purcell and Frank Bateman on the following dates:

1. Conversation with Charles Shipman December 20, 1948

2. Telephone conversation with Robert R. Young December 28, 1948

3. Telephone conversation with Robert R. Young December 30, 1948

4. Telephone conversation with Robert R. Young January 3, 1949

[fol. 382] 5. Telephone conversation with Frank Bateman March 16-21, 1949

6. Telephone conversation with Robert W. Purcell April 27, 1949

7. Telephone conversation with Robert W. Purcell April 27, 1949

8. Telephone conversation with Robert W. Purcell August 3, 1949

9. Telephone conversation with Robert R. Young August 25, 1949

(E) The following documents:

1. Reports of Charles Shipman April 7, 1949, August 15, 1949

2. Report of Saunders, Stiver & Co. January 10, 1949

3. Minutes of the Alleghany Board of Directors March 24, 1949

(F) Personal contact with Robert W. Purcell, Charles Shipman, J. J. Anzalone, Robert R. Young.

(G) Facts and circumstances other than presently known to plaintiff which are reflected in Mr. Kirby's representation that he was "devoting a substantial amount of

[his] time to [the management of IDS]", and to the direction of its policies, (Alleghany Corporation Proxy Statement, May 3, 1950, p. 7) after IDS came under the control of Alleghany and prior to April 6, 1950.

III. *As to Interrogatory 3:*

Plaintiff cannot, of its own knowledge, state which of the facts and circumstances listed in answer to interrogatory 3, Allan P. Kirby actually knew of, however, documents listed in answer to interrogatory 1 and the facts and circumstances described in answer to interrogatory 2, support plaintiff's contention that Kirby "knew or should have known" of each of these facts and circumstances.

[fol. 382a] IV. *As to Interrogatory 4:*

Plaintiff cannot, of its own knowledge, state which of the facts and circumstances listed in answer to interrogatory 4, Allan P. Kirby actually knew of, however, documents listed in answer to interrogatory 1 and the facts and circumstances described in answer to interrogatory 2, support plaintiff's contention that Kirby "knew or should have known" of each of these facts and circumstances.

V. *As to Interrogatory 5:*

Plaintiff cannot state whether the documents listed in plaintiff's answer to interrogatory 1 were seen or made available to Seymour Graubard, George Brussel, Jr., Abraham Pomerantz or other counsel for plaintiffs in *Zenn* or *Breswick* or the objectants or intervenors in *Zenn,* Eric J. Klinger, Referee (Special Master) Fitzsimmons or the State or Federal Courts.

Abraham Pomerantz, general counsel for plaintiffs in *Zenn* (State) and *Zenn* (Federal) and Thomas F. Daly, counsel to certain defendants in *Zenn* (State), *Zenn* (Federal) and *Breswick* have testified that they did not keep lists of documents submitted by defendant's for plaintiff's

review in *Zenn* (State) *Zenn* (State) (Tr. pp. 4049, 4240-50). Similarly, Seymour Graubard, attorney for objectant Rosen, has testified (Deposition Tr. pp. 162-3) that he did not keep a list of documents submitted to him for examination, by the proponents of the settlement in *Zenn* (State) or in *Breswick*. Moreover, the present management of plaintiff has not found in the files of the Corporation any list of documents taken from said files for submission to any of said plaintiffs or objectants. Plaintiff, however, has not completed its discovery proceedings in this regard in this [fol. 383] action.

In further answer to this interrogatory, plaintiff states:

(a) By letter dated July 26, 1954, Mr. Norman Waag, Vice President and Controller of IDS sent to Robert Purcell three documents identified as follows:

(i) "condensed income statement for IDS by quarters for the years 1949 and 1950"

(ii) "a separate schedule showing some of the bigger projects that produced income in 1950 and showing the quarter in which the income was received."

(iii) "our Summary of Operations for the year 1950 which shows the income statement for that year and for 1949 and also a comparison to a projection made for the year 1950. This projection was most likely completed in January of 1950 which would indicate that we anticipated a considerable improvement in our mortgage operations."

(b) By letter dated July 27, 1954, Mr. Purcell wrote Robert R. Young in part as follows:

"The enclosed letter from Mr. Waag with accompanying material is information relating to 1949 versus 1950 income and is forwarded in line with our talk following your meeting with Pomeran[tz].

"I suggest that you note among other things on page 2 of the income account attached to the 'Comments on Operations' for December 1950 that Income from Operations, i.e. before taxes or capital transactions, had been projected at $5,993,168, but turned out to be $8,600,444. This may not be too helpful as Income from Operations in 1949 was only $1,515,401."

(c) Neither the July 26, 1954, nor the July 27, 1954, letters were introduced as exhibits in the *Zenn* (State) or *Breswick* hearings. Nevertheless, items (a)(i) and (a)(ii) above, were introduced as *Zenn* Plaintiffs' Exhibits 97 and 98. Item (a)(iii), containing the pro-
[fol. 384] jection of income which Mr. Purcell stated "may not be too helpful," however, was not introduced.

(d) No internal projections or independent actuarial projections of IDS income and no other items listed in paragraph I of Plaintiff's Answers to Interrogatories herein dated January 14, 1963, were marked as Exhibits before Robert Fitzsimmons as Referee or as Special Master in *Zenn* (State) or *Breswick*, respectfully. Plaintiff believes that the facts contained in said projections and other documents listed in said answer were so patently material to the inquiry then being conducted that the documents containing them would have been marked had they been seen by the attorneys for plaintiffs or the attorneys for objectant Rosen in *Zenn* (State) or by the attorneys for plaintiffs in *Breswick* or by the Referee or Special Master during the course of the hearings held in said actions with respect to the fairness and adequacy of the then proposed settlement.

As to Interrogatory 8:

Plaintiff does not know the source of the material quoted at page 58 of the Report of the Referee *Zenn* v. *Anzalone*. It knows of no legal text, case decision, book, paper, record,

document or other writing which existed prior to November 17, 1958, which contains the quoted material.

Bernard C. McGuire.

[fol. 385] *Duly sworn to by Bernard C. McGuire, jurat omitted in printing.*

[fol. 386] Affidavits of service (omitted in printing).

[fol. 388]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR. and FRED M. KIRBY, Defendants.

ANSWERS BY DEFENDANT ALLAN P. KIRBY TO INTERROGATORIES PROPOUNDED BY PLAINTIFF ALLEGHANY CORPORATION—Filed January 31, 1963

Answers of defendant, Allan P. Kirby, to interrogatories directed to him by plaintiff, Alleghany Corporation, on December 31, 1962:

Answer to Interrogatory "I."

As to Subparagraph "(a)":

(i) "Diary" 1948;

(ii) "Dailyaide" (Diary) 1949;

(iii) "1950 Year Book" (Diary);

[File endorsement omitted]

(iv) (1) Series of telephone bills from the New Jersey Bell Telephone Company respectively dated January 21, February 21, March 21, April 21 and May 21, 1950 showing calls billed Morristown 4-4800.

(2) Series of telephone bills from the New York Telephone Company respectively dated January 21, February 21, March 21, April 21 and May 21, 1950 showing calls billed to REctor 2-4282.

(3) Three sheets of paper, headed respectively "Morristown 4-4800 bill dated March 21, 1950"; "Morristown 4-4800 bill dated May 21, 1950"; "Morristown 4-4800 bill dated June 21, 1950."

[fol. 389] (4) Six pages showing breakdown of charges for telephone number REctor 2-4282 for monthly periods ending, respectively on 1/15/50; 2/15/50; 3/15/50; 4/15/50; 5/15/50; and 6/15/50.

As to Subparagraph "(b)":

Items (i), (ii) and (iii) above were prepared, and all entries therein were made by my secretary, Miss Blodwen C. Owens. The documents contained in answer (iv) were prepared by a switchboard operator (Marie D. Messer) who was formerly employed at my office.

As to Subparagraph "(c)":

All documents listed and described in answer I (i)-(iv) are in my custody at 17 De Hart Street, Morristown, New Jersey, or at the offices of Donovan Leisure Newton & Irvine, 2 Wall Street, New York 5, New York.

Answer to Interrogatory "II."

Prior to December 20, 1948 Various conversations APK with Young and/or Purcell re IDS.

December 20, 1948	Meeting, 17 De Hart Street, Morristown, N.J., between Allan P. Kirby (hereinafter "A.P.K.") and Charles Shipman re Investors Diversified Services, Inc. (hereinafter "I.D.S.").
February 22, 1949	Conversation Robert R. Young (hereinafter "R.R.Y.") and A.P.K. re "Investors Syndicate Matter."
Circa February 25, 1949	Telephone conversation, A.P.K. and R. McKinney re Possible Complaints of Investors Syndicate Mortgage Certificate Holders.
March 2, 1949	Meeting, Board of Directors, Alleghany Corporation. (See Minutes.)
Circa March 14, 1949	Conversation Purcell—A.P.K. re "asking" price on I.D.S. stock.
[fol. 390] March 16, 1949	Telephone conversation A.P.K. and R.R.Y. re suitability of I.D.S. as an Alleghany investment.
Prior to March 22, 1949	Conversation with John H. Blackman during which Joseph B. MacLean was recommended to do some statistical work for Alleghany.
Prior to April 6, 1949	Conversation A.P.K. and R.R.Y. re actuarial study of I.D.S.

Prior to April 18, 1949	Conversation A.P.K. and Purcell re when Investors Syndicate high-priced contracts will pay out.
April 21, 1949	Meeting, Board of Directors, Aleghany Corporation (see Minutes).
Sometime after April 21, 1949	Conversation A.P.K. and R.R.Y. re desirability of their becoming directors of I.D.S.
May 17, 1949	Meeting, Board of Directors, Alleghany Corporation (see Minutes).
Early June, 1949	Telephone conversation, Purcell and A.P.K. re ISA.
August 16, 1949	Meeting, Board of Directors, Alleghany Corporation (see Minutes).
September 7, 1949	Telephone conversation, Frank B. Bateman and A.P.K. re I.D.S.
Prior to November 4, 1949	Telephone call, Purcell to A.P.K. re E.P. Schooley going on Board of Directors of ISA.
Prior to December 6, 1949	Telephone conversation R.R.Y., re proposal that officers exchange their Alleghany preferred for Alleghany's I.D.S. Class A.
December 6, 1949	Meeting, Board of Directors, Alleghany Corporation (see Minutes).

December 15, 1949	Date of resolutions by Executive Committee, Alleghany Corporation. January 20 set as date to accept Tenders.
[fol. 391]	
Prior to December 19, 1949	Conversations, A.P.K. and Purcell re arrangements of mutual benefit to I.D.S. and Woolworth Co. regarding real estate matters.
December 23, 1949	Investors Syndicate Christmas party attended by A.P.K.
January 21, 1950	Date of resolution, Executive Committee, Alleghany Corporation. Extends final date for Tenders to February 20, 1950.
Prior to February 16, 1950	Telephone conversation, Purcell and A.P.K. re substitution of "P.M.M." as auditors for ISA and I.D.S.
February 16, 1950	Meeting at Camden, William E. Eppler and A.P.K. re Eppler proposal to substitute "P.M.M." for Rossetter as auditors of I.D.S. and Funds.
February 24, 1950	Meeting, Board of Directors, Alleghany Corporation (see Minutes).
March 3, 1950	Conversation, Anzalone and A.P.K. re Exchange Transaction.
May 18, 1950	Meeting, Board of Directors, Alleghany Corporation (see Minutes).

Answer to Interrogatory "III"

Files:

Alleghany—1949
Bateman, Frank B.—1949
H—1949
M—1949
P—1948
McKinney, Robt. M.—1949
Purcell, Robert W.—1949
Routh, Joseph R.—1949
[fol. 392] Shipman, Chas.—1949
Young, Robert R.—1949
Alleghany—1950
William E. Eppler, 1950
IDS—1950
Manufacturers Trust Co.—1950
Robert W. Purcell—1950
IDS—1951
Robert R. Young—1951
Robert W. Purcell—1952
Robert R. Young—1952
Alleghany Corp.—EYB*—1949
Allan P. Kirby—EYB—1949
Correspondence with Mr. Kirby—EYB—1949
Investors Syndicate—EYB—1949
Alleghany Corp.—EYB—1950
Correspondence to and from Allan P. Kirby—EYB—1950
Investors Diversified Service—EYB—1950
Alleghany Corporation, Financial Statements and Reports—EYB—1953.
Alleghany Corporation Minutes and Resolutions—EYB—1953

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* EYB is Edward Y. Baugeard, assistant to Mr. Allan P. Kirby at 17 DeHart Street, Morristown, New Jersey. The EYB files were kept by Mr. Baugeard.

Alleghany Corporation—Correspondence, Misc.—EYB —1954
Alleghany Corporation—Correspondence, Misc.—EYB —1955
Alleghany Corp.—Correspondence, Misc.—EYB—1956

[fol. 393] Answer to Interrogatory "IV."

December 20, 1948	Letter, 12/20/48, A.P.K. to Purcell re proposed acquisition by Alleghany of stock in I.D.S.
December 22, 1948	Letter Purcell to A.P.K. re A.P.K.'s letter of 12/20/48.
December 31, 1948	Shipman report on Investors Syndicate.
After December 31, 1948	Annual Report I.D.S. for 1948.
Various, 1949	Various statements (20 in all) re Alleghany's portfolio in 1949, each noting acquisitions, holdings, and/or authorizations to buy stock of IDS, dated respectively July 1949; 4/8/49; 4/11/49; 4/14/49; 4/16/49; 4/20/49; 4/23/49; 4/26/49; 4/28/49; 4/29/49; 4/30/49; 5/2/49; 5/3-5/49; 5/6/49; April '49; 5/16-17/49; 5/18/49; May '49; 9/14/49; 12/29/49.
February 11, 1949	Memorandum Baugeard to A.P.K. re meeting "tomorrow" with Shipman and McKinney re I.D.S.

February 12, 1949	Letter, Robert McKinney to A.P.K. re form of a letter to be sent to R.R.Y. re Investors Syndicate. Attaches copy of such a letter, which was sent in connection with another transaction on 3/9/48.
February 14, 1949	Memo Baugeard to A.P.K. re meeting preceding Saturday with Shipman and McKinney re I.D.S.
February 17, 1949	Letter Shipman to Baugeard forwarding Investors Syndicate memorandum dated 12/31/48.
February 17, 1949	Memo Shipman to Baugeard re "Defaults on Investors Syndicate Certificates."
February 17, 1949	Letter, A.P.K. to Robert McKinney. A.P.K. glad to have McKinney draft a letter as is mentioned in his letter of 2/12/49.
February 19, 1949	Letter, R. McKinney to A.P.K. re McKinney's receipt of information re IDS.
February 23, 1949	Letter, A.P.K. to R. McKinney re fears re I.D.S.
February 24, 1949	Memo Baugeard to A.P.K. re Shipman 10 page memo on I.D.S. and re Baugeard digest.
February 25, 1949	Letter, McKinney to A.P.K. re draft letter to R.R.Y. and re complaints of certificate holders.

[fol. 394]

March 2, 1949	Minutes of meeting of Board of Directors of Alleghany.
March 15, 1949	Memo Baugeard to APK re IDS holdings of Fund shares.
March 15, 1949	"Report and Recommendation on Investors Syndicate, Inc." by Saunders, Stiver & Co.
March 17, 1949	Letter, APK to J. P. Routh requesting Routh review proposed acquisition of TDS.
March 17, 1949	Memo Baugeard to APK re IDS and Funds portfolios etc. and Gamble asking price.
March 22, 1949	Letter, A.P.K. to MacLean, re MacLean's availability to do some statistical work for Alleghany. Asks him to get in touch with Shipman concerning this work.
March 22, 1949	Letter, Robert McKinney to A.P.K. McKinney thanks Kirby "for the letters re Investors Syndicate."
March 23, 1949	Letter, J.B. MacLean to A.P.K. MacLean unavailable to do any work for Alleghany until the end of the year.
March 24, 1949	Minutes, meeting of Board of Directors, Alleghany Corporation. A.P.K. not present.
March 25, 1949	Letter, Allan P. Kirby to R. McKinney. Alleghany is moving forward cautiously on the

	Investors Syndicate matter; lr. also refers to legal research and study of acquisition cost and actuarial study.
March 31, 1949	Letter, A.P.K. to Shipman re letter from another to A.P.K. re I.D.S. margin of profit and re an actuary.
April 2, 1949	Letter, Bateman to Brooks Potter re desirability of purchasing Investors Syndicate.
April 4, 1949	Resolution, Executive Committee, Alleghany Corporation. Authorization for open market purchases of I.D.S.
April 4, 1949	Letter, Shipman to A.P.K. re I.D.S.' profit on loading charge and re acquisition costs.
[fol. 395] April 6, 1949	Letter, A.P.K. to Charles Shipman. A.P.K. not interested in piecemeal reports, will study later with R.R.Y.
April 7, 1949	Copy of letter, Purcell to Brooks Potter forwarding copy of letter from George McClintock to Bateman re IDS dated 4/1/49 (attached).
April 9, 1949	Letter, A.P.K. to Bateman, thanks for copy of Bateman's letter to Potter of 4/2/49. Presume that the matter will be discussed at next Alleghany meeting.

April 12, 1949	Supplement to analysis of Investors Syndicate, Inc. initialled "C.S."
April 12, 1949	Shipman memo to A.P.K. forwarding Shipman report of 4/7/49 (attached).
April 15, 1949	Transmittal letter, Shipman to A.P.K., attaches a White & Case opinion letter dated 4/13/49 concerning Alleghany and its directors' possible liability for misconduct on the part of Investors Syndicate or its representatives after the proposed purchase by Alleghany.
April 15, 1949	Memo, R.R.Y. to A.P.K. attaching a rough draft of memo R.R.Y. proposed to send the Alleghany Board.
April 15, 1949	Memorandum from "Ed" to "Mr. Kirby", pointing out that the existence of a book value for IS stock in 1956 depends on a table contained in an unidentified memorandum.
April 16, 1949	Letter, Bateman to A.P.K. Bateman notes that he should not have gone to Florida when Purcell asked him to re the Investors Syndicate deal. Letter concerns Bateman's ill health.
April 18, 1949	Letter, A.P.K. to R.R.Y. re R.R.Y.'s speech and when high-priced I.D.S. contracts will be paid out.

April 18, 1949	Memo, R.R.Y. to A.P.K. attaching (1) letter, Purcell to R.R.Y., 4/16/49 (transmittal letter) and (2) draft of a general agreement with Gamble.
April 19, 1949	Memo, R.R.Y. to A.P.K. attaching a copy of Young's memo to Alleghany Board concerning the purchase of Inyestors Syndicate.
[fol. 396] April 21, 1949	Copy of agenda for Alleghany Board meeting of 4/21/49. Attached as Schedule A is a list of purchases and sales of securities by Alleghany, 3/23/49-4/19/49 inclusive and a table showing the status of prior Alleghany purchase authorizations.
April 21, 1949	Minutes, meeting of Board of Directors of Alleghany Corporation.
April 27, 1949	Resolution, Executive Committee, Alleghany Corporation, re open market purchases of I.D.S.
May 17, 1949	Agenda, Alleghany Board meeting of May 17, 1949 and undated schedules show Alleghany purchases and sales 4/20-5/15/49 inclusive, and status of purchase and sale authorizations as of 5/15/49.

May 31, 1949	Note Anzalone to Alleghany Directors transmitting Minutes of Board of Directors of Alleghany 5/17/49 and Minutes.
May 31, 1949	Memo, Purcell to A.P.K. attaching letter, E.E. Crabb to Mark Hodo, 5/25/49 and letter from Hodo to A.P.K. dated 5/5/49, inquiring as to whether I.D.S. could use Hodo's services in selling mortgage loans. Crabb replied that this was unlikely.
August 5, 1949	Memo, Ed to A.P.K. re the latest I.D.S. actuarial report. Attached is a memo from Shipman to A.P.K. noting that he had written to Crabb for a copy of the actuarial study and was attaching a copy of Crabb's reply. (Crabb's reply attached.)
August 11, 1949	Copy of Memo, Hatch to Crabb attaching schedules re July 1949 status of Investors Stock Fund.
August 16, 1949	Minutes, Board of Directors of Alleghany 8/16/49.
August 16, 1949	Memo, Shipman to A.P.K. and attached copy of Shipman report dated 8/15/49.
August 17, 1949	Letter, A.P.K. to R.R.Y. re Shipman report of August 15, 1949.

September 9, 1949	Letter, Bateman to A.P.K. re responsibilities at I.D.S., etc.
September 9, 1949	Copy. of letter, Waag to Shipman with enclosed copy of comparative balance sheet, income and surplus statements of I.D.S. at June 30, 1949.

[fol. 397]

September 23, 1949	Letter, Purcell's secretary to Baugeard forwarding various financial reports which show, inter alia, portfolios of the various IDS companies.
September 26, 1949	Letter, Purcell to Baugeard re restrictions and limitations on and objectives of IDS, ISA, ISC, IST & G and the 3 funds in their portfolio selections.
September 30, 1949	Copy, letter to Purcell (from Baugeard ?) acknowledging receipt of Purcell's letter of 9/26/49 and commenting on value of certain brewery stocks and Food Fair.
November 23, 1949	Letter, William H. Henszey to A.P.K. Henszey knows Gamble well and expresses his interest in Alleghany's recent purchase.
November 23, 1949 [sic]	Letter, A.P.K. to Henszey. Reply to Henszey letter of same date, but no mention of I.D.S. or Gamble. (On back of letter, Henszey to A.P.K., 11/23/49.)

December 6, 1949	Agenda for Alleghany Board meeting of December 6, 1949 with schedules and tables attached.
December 9, 1949	Memo, Baugeard to A.P.K. re anticipated capital gains tax if A.P.K. tenders 20,000 Preferred A.
December 31, 1949	George Rosetter & Co. report on ISA for 3 years ending 12/31/49.
After December 31, 1949	Annual Report ISA Inc.
After December 31, 1949	Annual Report IDS for 1949.
After December 31, 1949	ISA Report on Operations Dec. 31, 1949.
After December 31, 1949	ISC Report on Operations Dec. 31, 1949.
January 3, 1950	Memo, Anzalone to members of Alleghany Executive Committee, enclosing copy of resolutions of December 15, 1949 re Tenders.
January 20, 1950	Two carbon copies of A.P.K. letter of tender to Alleghany Corporation. One marked in upper lefthand corner "A.P.K. in Camden."
January 25, 1950	Chart "Comparative new business productions and representatives turnover for December (1949) and year to date 1949, 1948, 1947. Accounting Department figures for Funds and I.S.A."

[fol. 398]

January 26, 1950	Letter, Baugeard to A.P.K. re N.Y. Times article on tender and other matters.
February 1, 1950	Memo, Anzalone to Directors of Alleghany enclosing minutes of meeting of Board of Directors on 12/6/49; attached memo Anzalone to Directors dated 4/12/50 re substitution of new pages 9, 10 and 11 for old pages 9 and 10 of minutes of Board of Directors on 12/6/49 adding preambles; attached minutes of Board of Directors of Alleghany Corporation on 12/6/49 consisting of 12 pages numbered 1-4, 5 (noted "new"), 5 (noted "old") and 6-11.
February 11, 1950	Letter, Purcell to R.R.Y. and A.P.K. reporting on the present situation in I.D.S. "and the accomplishments of the nine months since Alleghany's acquisition."
February 20, 1950	Letter, Eppler to A.P.K. and attached Memo of conversation between Eppler and Purcell all re P.M.M. as auditors of I.D.S. and Funds.
February 22, 1950	Memo, Purcell to A.P.K. Purcell and R.R.Y. both agreed that the I.D.S. audit should go to P.M.M.

February 24, 1950	Minutes, Board of Directors of Alleghany Corporation.
February 24, 1950	Agenda for meeting of Board of Directors of Alleghany on February 24, 1950.
March 3, 1950	Memo, Anzalone to A.P.K. forwarding original and two copies of exchange offer for signature.
March 3, 1950	Schedule "Comparative new business production and representatives turnover for January 1950, 1949, 1948—Accounting Department figures for Funds and I.S.A.—Gross Figures."
March 10, 1950	Memorandum Anzalone to Baugeard re "Questionnaire" and answers thereto relative to A.P.K. exchange of Alleghany Series A pfd for IDS Class A stock.
March 28, 1950	IDS Summary of Operations 1949.
March 14, 1950	Memo, Anzalone to A.P.K. attaches a draft of the Alleghany Corporation proxy statement. Anzalone to telephone A.P.K. for latter's comments.
[fol. 399] March 28, 1950	Copy of Memo, Shipman to R.R.Y. and A.P.K. re footnote to 1949 report of ISA by ISA's auditors.

April 4, 1950	Memo, Anzalone to Kirby re the number of shares of preferred stock remaining in Alleghany's treasury without giving effect to the prior preferred tendered by Anzalone, Young and Kirby.
April 14, 1950	Letter, E. V. Staab to A.P.K. noting enclosed reports "Comments on operations financial statements" Investors Mutual, stocks and Selective funds.
May 9, 1950	Letter, Purcell to R.R.Y. and A.P.K. offering to purchase I.D.S. stock from R.R.Y. and A.P.K. if they were still willing.
May 9, 1950	Letter, Anzalone to A.P.K. advising him that Alleghany is prepared to make delivery of IDS Class A shares upon receiving Series A Alleghany certificates.
May 11, 1950	Letter, Anzalone to A.P.K. advising A.P.K. that Manufacturers Trust Co. has been instructed to deliver 24,062 shares of IDS Class A to A.P.K. and copy of attached letter of instructions to Manufacturers Trust Co.
May 11, 1950	Memorandum Baugeard to A.P.K. re figures relating to tender of Alleghany pfd A for IDS and capital gain on APK's Alleghany pfd. A.

May 12, 1950	Letter, A.P.K. to Manufacturers Trust Co. containing instructions as to the shares of Alleghany preferred to be transferred in exchange for the IDS Class A.
May 12, 1950	Letter, A.P.K. to Manufacturers Trust Co. directing Manufacturers to deliver to Purcell 6,366 shares of Class A of the 24,062 shares received by A.P.K. from Alleghany.
Circa May 15, 1950	Schedule "B" entitled "Purchases and Sales of Securities [by Alleghany] Feb. 24, 1950 to May 15, 1950, inclusive".
May 18, 1950	Minutes, Board of Directors of Alleghany.
May 18, 1950	Agenda for meeting of Board of Directors of Alleghany on May 18, 1950.
[fol. 400] May 22, 1950	Letter, Crabb to A.P.K., enclosing a copy of the Mortgage Department projections for 1950 dated April 25, 1950.
May 23, 1950	3 Vouchers, Manufacturers Trust Co. showing delivery of IDS Class A stock certificates to APK and to Purcell and showing deposit of $51,852.98.
June 28, 1950	Memo, Baugeard to APK and attached memo WEE (4/24/50) and attached report of Dreyfus & Co. on IDS.

October 17, 1950	Minutes, Board of Directors, Alleghany.
October 17, 1950	Agenda for meeting of Board of Directors of Alleghany on Oct. 17, 1950.
November 10, 1950	Memo, Baugeard to APK re functions of IDS subsidiaries and Funds, with chart attached.
October 3, 1951	Letter, APK to RRY re agreement "in the very beginning" to keep IDS "at arm's length until such time as we were satisfied that it was what we hoped" etc.
November 13, 1951	Letter, RRY to APK re Bateman as proposed director of IDS and attachment re National Airlines.
July 22, 1952	Transmittal note RRY to APK with attached copy of letters (1) from Crabb to Anzalone (7/16/52) (2) from Crabb to SEC (7/16/52) re repayment of Alleghany loan of $137,259.95 made to IDS.
December 26, 1952	Transmittal note "Bob" to APK and ltr. to Edmund Brown re Alleghany portfolio.
November 10, 1953	Agenda, meeting Board of Directors of Alleghany Corporation, November 10, 1953.
December 4, 1953	Memorandum from J. Anzalone to the Directors of Alle-

	ghany Corporation forwarding copy of minutes of meeting of the Board of Directors, November 10, 1953; (minutes attached).
November 2, 1954	Letter from Baugeard to David Wallace re past exchanges between A.P.K. and any of his personal holding companies and Alleghany Corporation.
[fol. 401] November 16, 1955	Letter from E. Baugeard to David W. Wallace re transaction in Alleghany stock by A.P. Kirby and by holding companies in which he had an interest.
March 30, 1956	Letter from E. Baugeard to Robert R. Young enclosing tabulation of all transactions made in Alleghany stock by A.P. Kirby and by three holding companies in which he had an interest.
Undated memoranda	Handwritten figures re various tenders including IDS.
Undated	IDS analysis Policies and Operations 1944-1949.

Note: Not all of the foregoing documents concern both "IDS, its financial condition or prospects *and* any proposed or executed transaction in the capital stock of IDS or its subsidiaries or affiliates [etc.]" (emphasis added). To the end of making full and complete disclosure of all documents which plaintiff may have intended to have identified by defendant Allan P. Kirby, defendant Kirby has read the two phrases in the disjunctive, so that a larger group of

documents is listed for plaintiff's information. Thus, all of the documents called for by a literal reading of Interrogatory "IV"", plus all others which would have been called for had the wording been in the disjunctive have been identified in the foregoing schedule.

State of South Carolina,
County of Kershaw, *ss.*:

Allan P. Kirby, being duly sworn, deposes and says: I have read and understand the foregoing answers to interrogatories and they are true and correct to the best of my information, knowledge and belief.

Allan P. Kirby.

Subscribed and sworn to before me this 29th day of January, 1963.

Austin M. Ihehea, Jr., Notary Public for S. C., My Commission Expires at the Pleasure of the Governor.

[fol. 401a] Acknowledgment of Service (omitted in printing).

[fol. 402]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR. and FRED M. KIRBY, Defendants.

REQUEST FOR ADMISSION UNDER RULE 36—
Filed January 11, 1963

Sirs:

Please Take Notice that defendants Allan P. Kirby and Charles T. Ireland, Jr. request plaintiff Alleghany Cor-

[File endorsement omitted]

poration, within 10 days after service of this request, to make the following admission for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

> That the following statement is true:
>
> All books, papers, records and documents which contained any "fact" or "circumstance" which was
>
> (i) a fact "which at the time of the 1950 Exchange Transaction he [defendant Allan P. Kirby] knew or should have known concerning the financial condition, future earnings and prospects of IDS [or] the ability of IDS to meet its contractual requirements;" or was
>
> (ii) a "fact" or "circumstance" "concerning the purported authorization of [the] 1950 Exchange Transaction by the Board of Directors of Alleghany [or] the steps in consummation thereof," which fact or cir- [fol. 403] cumstance was "material to an evaluation of his [Mr. Kirby's] liability on the claims arising out of [the] 1950 Exchange Transaction and the settlement proposed in connection therewith" which was not "adduced before the Referee, Special Master, this Court or the New York Supreme Court" in *Zenn, et al.* v. *Anzalone, et al.*, (Sup. Ct., N.Y. Co. Index No. 7244/1954) (hereinafter *Zenn* State) or in *Breswick & Co., et al.* v. *Briggs, et al.*, (U.S.D.C., S.D.N.Y. Civ. Action No. 98-371) (hereinafter *Breswick*).

were tendered by the defendants in *Zenn* State and *Breswick* for examination to and were available for examination by the attorneys for plaintiffs and the attorneys for objectant Rosen in *Zenn* State and by the attorneys for plaintiffs in *Breswick* during the course of the hearings held before the Referee in *Zenn* State and the hearings held before the Special Master in *Breswick* or were submitted to Referee (Special Master) Fitzsimmons for examination by him in his official capacity as Referee (Special Master)

during those hearings for his determination as to whether such books, papers, records and documents should be admitted in evidence or should be made available to such attorneys for inspection. (The quoted material is taken from paragraph 39 of the Amended and Supplemental Complaint.)

Dated: New York, New York, January 11, 1963.

Yours, etc.

Donovan Leisure Newton & Irvine, By Walter L. Stratton, A Member of the Firm, Attorneys for Defendant Allan P. Kirby, Office and P. O. Address: 2 Wall Street, New York 5, New York.

[fol. 404] Kissam & Halpin, By Leo T. Kissam, A Member of the Firm, Attorneys for Defendant Charles T. Ireland, Jr., Office and P. O. Address: 120 Broadway, New York 5, New York.

To:

Townley, Updike, Carter & Rodgers, Attorneys for Plaintiff Alleghany Corporation, 220 East 42nd Street, New York, New York and Randolph Phillips, Attorney, Pro Se, 128 East 70 Street, New York 21, New York.

[fol. 404a] Acknowledgment of Service (omitted in printing).

[fol. 405]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR. and FRED M. KIRBY, Defendants.

ANSWER TO REQUEST FOR ADMISSION—
Filed January 22, 1963

Plaintiff Alleghany Corporation by Bernard C. McGuire, its Assistant Secretary, in answer to the Request for Admission Under Rule 36, dated January 11, 1963, propounded by defendants Allan P. Kirby and Charles T. Ireland, Jr., denies said request because upon information and belief:

(1.) The statement contained in said request for admission is not true in that:

(a) by letter dated July 26, 1954, Mr. Norman Waag, Vice President and Controller of IDS sent to Robert Purcell three documents identified as follows:

(i) "condensed income statement for IDS by quarters for the years 1949 and 1950"

(ii) "a separate schedule showing some of the bigger projects that produced income in 1950 and showing the quarter in which the income was received."

[File endorsement omitted]

(iii) "our Summary of Operations for the year 1950 which shows the income statement for that year and for 1949 and also a comparison to a projection made for the year 1950. This projection was most [fol. 406] likely completed in January of 1950 which would indicate that we anticipated a considerable improvement in our mortgage operations."

(b) By letter dated July 27, 1954, Mr. Purcell wrote Robert R. Young in part as follows:

"The enclosed letter from Mr. Waag with accompanying material is information relating to 1949 versus 1950 income and is forwarded in line with our talk following your meeting with Pomeran[tz].

"I suggest that you note among other things on page 2 of the income account attached to the 'Comments on Operations' for December 1950 that Income from Operations, i.e. before taxes or capital transactions, had been projected at $5,993,168, but turned out to be $8,600,444. This may not be too helpful as Income from Operations in 1949 was only $1,515,401."

(c) Neither the July 26, 1954, nor the July 27, 1954, letters were introduced as exhibits in the *Zenn* (State) or *Breswick* hearings. Nevertheless, items (a)(i) and (a)(ii) above, were introduced as *Zenn* Plaintiffs' Exhibits 97 and 98. Item (a)(iii), containing the projection of income which Mr. Purcell stated "may not be too helpful", however, was not introduced.

(d) No internal projections or independent actuarial projections of IDS income and no other items listed in paragraph I of Plaintiff's Answers to Interrogatories herein dated January 14, 1963, were marked as Exhibits before Robert Fitzsimmons as Referee or as Special Master in *Zenn* (State) or *Breswick*, respectively. Plaintiff believes that the facts contained in said projections and other documents listed in said

[fol. 407] answer were so patently material to the inquiry then being conducted that the documents containing them would have been marked had they been seen by the attorneys for plaintiffs or the attorneys for objectant Rosen in *Zenn* (State) or by the attorneys for plaintiffs in *Breswick* or by the Referee or Special Master during the course of the hearings held in said actions with respect to the fairness and adequacy of the then proposed settlement.

2. There is no statement in the record of *Zenn* (state or federal) or *Breswick* on behalf of Mr. Kirby or any other defendant calling the Referee's or any Court's attention to the Referee's misquotation of the Alleghany Articles of Incorporation as pleaded in paragraph 40 of the Amended and Supplemental complaint herein.

3. Plaintiff presently is without knowledge other than as heretofore stated in this answer, to enable it to admit or deny whether said documents (listed in paragraph I of plaintiff's answers to interrogatories herein) were submitted to attorneys for plaintiffs or objectant Rosen in *Zenn* (State) or attorneys for plaintiffs in *Breswick*, Abraham Pomerantz, general counsel for plaintiffs in *Zenn* (State) and *Zenn* (Federal) and Thomas F. Daly, counsel to certain defendants in *Zenn* (State) *Zenn* (Federal) and *Breswick* have testified that they did not keep lists of documents submitted by defendants for plaintiff's review in *Zenn* (State) (*Zenn* (State) Tr. pp. 4049, 4240-50). Sim- [fol. 408] ilarly, Seymour Graubard, attorney for objectant Rosen, has testified (Deposition Tr. pp. 162-3) that he did not keep a list of documents submitted to him for examination, by the proponents of the settlement in *Zenn* (State) or in *Breswick*. Moreover, the present management of plaintiff has not found in the files of the Corporation any list of documents taken from said files for submission to any of said plaintiffs or objectants. Plain-

tiff, however, has not completed its discovery proceedin
in this regard in this action.

Bernard C. McGuire, Assistant Secretar

Bernard C. McGuire, being sworn, says: I signed th
foregoing answer on January 21, 1963, as Assistant Se
retary of Alleghany Corporation, plaintiff above named,
Maryland corporation; I have read the foregoing answer
said request for admission and am informed in connectio
therewith; said answer is stated on information and belie
and I believe said answer to be true.

Bernard C. McGuire, Assistant Secretar

Sworn to before me this 22nd day of January, 1963.

Adelaide R. O'Neill, Notary Public, State of New Yor
No. 03-8221185, Qualified in Bronx County, Cert. filed
New York County. Commission Expires March 30, 196

[fol. 409] Affidavit of Service (omitted in printing).

[fol. 410]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR. and FRED M. KIRBY, Defendants.

STIPULATION—Filed April 23, 1963

It Is Hereby Stipulated and Agreed, pursuant to Rule 2
Federal Rules of Civil Procedure, between counsel for th

[File endorsement omitted]

respective parties and Randolph Phillips, *pro se*, that, for the purpose of obtaining and identifying copies of certain documents located in the files of Investors Diversified Services, Inc., (hereafter IDS) in connection with offering such documents upon the trial of this action:

1. Counsel for plaintiff may take the deposition of IDS by Ivan Hone, Manager, Records Department, IDS, at the offices of Dorsey, Owen, Barber, Marquart & Windhorst, 2400 First National Bank Building, Minneapolis, Minnesota, before Earl G. Anderson, an officer authorized to administer oaths by the laws of the United States and Minnesota, or some other officer so authorized, on the day of , 1963, or at such adjourned date as may be agreed upon by the undersigned.

2. Counsel for plaintiff will secure the issuance of a subpoena by the Clerk of the District Court of Minnesota, Fourth Division, or a Judge thereof, directed to Ivan Hone, requiring him to appear and testify at the time and place specified above, and directing him to produce the documents [fol. 411] listed in Exhibit A annexed hereto.

3. Said deposition shall be conducted by counsel for plaintiff and shall be limited to (a) testimony identifying each of the documents listed in Exhibit A annexed hereto (b) testimony as to whether each of the documents was received or prepared by IDS, and kept by IDS in the regular course of its business and (c) testimony as to the furnishing of such documents or any other documents relating to the financial condition, operations or prospects of IDS or its subsidiaries or affiliated fund companies, to Alleghany, its attorneys or Allan P. Kirby.

4. Upon completion of the deposition, the documents identified on the deposition shall be returned to Mr. Hone who will arrange to make copies of each such document and thereafter, supply one copy to each party desiring such copies, at the expense of such party.

5. The undersigned reserve the right, on the trial o this action, to object to the introduction in evidence of copy of any of the documents identified and supplied i connection with the above deposition upon any groun authorized under the applicable rules of evidence, excep that none of the said documents shall be inadmissible i evidence, on the trial of this action, upon the ground tha it is not a true copy of such document as kept in the file of IDS in the regular course of its business.

Dated: February 22, 1963

Townley, Updike, Carter & Rodgers, Attorneys fo Plaintiff, Alleghany Corporation, By Stuart N Updike.

[fol. 412] Donovan Leisure Newton & Irvine, Attor neys for Defendants Allan P. Kirby and Fred M Kirby, By Granville Whittlesey, Jr.

Kissam & Halpin, Attorneys for Defendant Charle T. Ireland, Jr., By Leo T. Kissam, per Granvill Whittlesey, Jr.

Randolph Phillips, Appearing *pro se*.

So Ordered:

Archie O. Dawson, U. S. D. J.

Feb. 27, 1963

[fol. 413]

EXHIBIT A TO STIPULATION

I

The original of the following documents, or, if the original is not in your possession or control, any copies thereof:

A. *Reports of Joseph Froggatt & Co., Inc.* (Annual and Special Independent Actuarial Valuations, Opinions and Projections):

1. *Annual Reports* for 1943, date unknown
1944, dated 5/ 1/45
1945, " 4/26/46
1946, " 5/ 6/47
1947, " 5/ 3/48
1948, " 4/29/49
1949, " 5/22/50
1950, " 5/16/51
1951, " 4/16/52

2. *Special Reports,* dated 3/31/48
" 3/25/49
" 4/ 7/49 (Re Valuation ISC)

B. *Reports of George Rossetter & Co.* (Annual Audits of IDS, ISA, ISTG, wholly-owned U.S. subsidiaries):

1. For the Year ended December 31, 1947, date unknown

2. For the Year ended December 31, 1948
(Re IDS) dated 4/20/49
(Re ISA) " 2/23/49
(Re Subs) " 3/31/49

3. For the Year ended
December 31, 1949
(IDS) dated 3/30/50
(Re ISA) date unknown
(Re Subs) dated 3/27/50
(Re ISTG) " 4/ 3/50

4. For the three Years ended
December 31, 1948
(Re ISA) dated 2/23/49

5. "Financial Statements (ISA) For The Three Years Ended December 31, 1949, For Use In Prospectus", dated February 21, 1950.

6. "Auditor's Report": [IDS] Financial Statements for the three years ended December 31, 1950 (for use in connection with Registration Statement on Form N-8B-4 under Investment Company Act of 1940), date unknown.

C. *Reports of Peat, Marwick, Mitchell & Co.* (Annual Audits of IDS, ISA, ISTG, wholly-owned subsidiaries):

1. For the Year ended
December 31, 1950, date unknown.

[fol. 414]

D. *Reports of Millar, MacDonald & Co.* (Annual Audits of ISC):

1. For the Year ended
December 31, 1947, date unknown

2. For the Year ended
December 31, 1948, dated 2/9/49

3. For the Year ended
December 31, 1949, " 2/7/50

4. For the Year ended
December 31, 1950, date unknown

E. *State of Minnesota, Department of Commerce, Banking Division, Report of Examination of IDS, Minneapolis, Minnesota, as at the close of business:*

1. For the Year ended December 31, 1948, dated 5/2/49
2. For the Year ended December 31, 1949, " 4/28/50
3. For the Year ended December 31, 1950, date unknown

F. *"Investors Diversified Services, Inc., Summary of Operations" (Including Exhibits and Schedules):*

1. At January 31, 1949, dated 4/12/49
2. At February 28, 1949, " 4/12/49
3. At March 31, 1949, " 4/12/49
4. At April 30, 1949, " 5/20/49
5. At May 31, 1949, " 6/22/49
6. At June 30, 1949, " 9/ 9/49
7. At July 31, 1949, " 9/15/49
8. At August 31, 1949, " 9/29/49
9. At September 30, 1949, " 10/24/49
10. At October 31, 1949, " 11/25/49
11. At November 30, 1949, " 12/28/49
12. At December 31, 1949, " 3/28/50
13. At January 31, 1950, " 4/12/50
14. At February 28, 1950, " 4/12/50
15. At March 31, 1950, " 4/24/50
16. At April 30, 1950, " 5/24/50

17. At May 31, 1950, " 6/23/50
18. At June 30, 1950, " 7/31/50
19. At July 31, 1950, " 8/29/50

[fol. 415]

20. At August 31, 1950, " 9/26/50
21. At September 30, 1950, " 10/25/50
22. At October 31, 1950, " 11/27/50
23. At November 30, 1950, " 12/26/50
24. At December 31, 1950, " 1/25/51

G. *"Investors Syndicate (after March 31, 1949, IDS), Minneapolis, Minnesota, Projected Condensed Profit and Loss Statement * * * including the Net Income of Subsidiaries before Profit and Loss from Sale of Investments and Income Taxes":*

1. For the Years 1947 through 1956 (on assumed basis of 3% stretchout and 1% surrender factor), dated 1/1/47
2. For the Years 1947 through 1956, dated 1/1/47
3. For the Years 1947 through 1951 (on basis of revised reserve schedules, amortization of mortgage premiums and increased capital), dated 1/1/47
4. For the Years 1947 and 1948 (by months), dated 1/1/47
5. For the Years 1948 through 1952 (revised April 29, 1948), dated 1/1/48 (as revised on or about 4/29/48).
6. For the Year 1948 (by months) (revised April 29, 1948), dated 1/1/48 (as revised on or about 4/29/48).
7. For the Years 1949 through 1953, dated December, 1948

8. For the Year 1949 (by months), dated 4/12/49
9. For the Years 1950 through 1954, dated 1/1/50
10. For the Year 1950 (by months), dated 1/1/49
11. For the Year 1950 (by months) (as revised August 29, 1950), dated 1/1/50 (as revised on or about 8/29/50)

H. *"Investors Syndicate of America, Inc., Minneapolis, Minnesota, Projected Income Statement • • • (.):*

1. For Years 1949 through 1953 (before profit or loss from sale of investments and income taxes), dated 1/1/49
2. For the Year 1949 (by months), dated 1/1/49

I. *"Assumptions Used in Calculating Projected Condensed Net Income Statement • • • (.) (including the net income of subsidiaries before profit or loss from sale of investments or income taxes):*

1. For the Years 1949 through 1953, dated December, 1948

[fol. 416]

2. For the Years 1950 through 1954, dated 1/1/50
3. For the Years 1951 through 1955, dated 1/1/51

J. *Assumptions Used in Calculating Projected Condensed Net Income Statement (ISA) for the Years 1949 through 1953,* dated 1/1/49

K. *ISA Summary of Operations 8 Months Ended August 31, 1949,* dated 9/1949

L. *ISC Summary of Operations 8 Months Ended August 31, 1949,* dated 9/1949

M. *Detailed Comparative Balance Sheet and Statement of Net Income and Earned Surplus (IDS) for the Period Ended August 31, 1949,* dated 9/1949

N. *Bear, Stearns & Co. Report,* dated 10/28/48

O. *Reports by Charles Shipman,* dated 12/18/48
12/31/48
1/ 4/49
4/ 7/49
8/15/49

P. *Saunders, Stiver & Co. Report,* dated 1/10/49
3/15/49

Q. *Annual Reports:*

1. ISC 1948
1949
1950

2. ISTG 1948
1949
1950

R. 1. Letter Bertin C. Gamble to Robert W. Purcell, dated April 6, 1949

2. Letters (3) Robert W. Purcell to H. K. Bradford, dated June 19, 1949

3. Letter Norman B. Waag to Charles Shipman, dated September 9, 1949

a. List of various statements and reports attached thereto.

b. Statements and reports enclosed therewith

c. All correspondence in response or relating to the letter and enclosures

4. Letter E. V. Staab to Allan P. Kirby, dated April 14, 1950

a. Reports enclosed therewith

[fol. 417] 5. Letter Norman B. Waag to Robert W. Purcell, dated July 26, 1954.

II

1. Originals or copies of all letters or memoranda or any instructions referring to the transmittal or delivery (a) of any of the documents listed under I, above, or (b) of any documents other than those listed under I above, relating to the financial condition, operations or prospects of IDS or its subsidiaries or affiliated fund companies, between November 11, 1948 and June 30, 1950, and between April 7, 1954 and January 20, 1956, to any of the following persons or entities:

(1) Alleghany Corporation;

(2) Allan P. Kirby;

(3) Robert R. Young;

(4) Robert W. Purcell;

(5) Frank B. Bateman;

(6) Brooks Potter;

(7) Joseph J. Anzalone;

(8) Walter W. Foskett;

(9) Henry J. Guild;

(10) Herman R. Neff;

(11) O. Henry Briggs;

(12) Andrew Van Pelt;

(13) Edward Y. Baugeard;

(14) David W. Wallace (limit to period April 7, 1954 to January 20, 1956);

(15) Thomas F. Daly, Esq., or Messrs. Lord, Day & Lord.

(16) Charles Shipman;

(17) Alvin J. Stiver or Saunders Stiver & Co. or any representative or employee thereof;

(18) Members of the Board of Directors of IDS.

[fol. 418] 2. All records and documents which specify, describe, or instruct as to, the normal or established practice or policy of IDS during the periods November 11, 1948 to June 30, 1950, and April 7, 1954 to January 20, 1956, in regard to the distribution of documents relating to the financial condition, operations or prospects of IDS or its subsidiaries or affiliates, including the documents listed under I, above.

[fol. 421]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR., and FRED M. KIRBY, Defendants.

STIPULATION—Filed April 23, 1963

It Is Hereby Stipulated and Agreed, pursuant to Rule 29, Federal Rules of Civil Procedure, between counsel for the respective parties and Randolph Phillips, *pro se,* that:

1. Counsel for plaintiff may take the deposition of IDS by Chester A. Klopp, Director of Internal Audit & Special Studies at the offices of IDS, Investors Building, Minneapolis, Minnesota, before Earl G. Anderson, an officer authorized to administer oaths by the laws of the United States and Minnesota, or some other officer so authorized, on the 14th day of March, 1963, or at such adjourned date as may be agreed upon by the undersigned.

[File endorsement omitted]

2. Counsel for plaintiff will secure the issuance of a subpoena by the Clerk of the District Court of Minnesota, Fourth Division, or a Judge thereof, directed to Chester A. Klopp, requiring him to appear and testify at the time and place specified above.

3. Said deposition shall be conducted by counsel for plaintiff and shall be limited to (a) testimony identifying certain documents, produced on the deposition of IDS by Ivan Hone, which relate to the distribution by IDS of finan- [fol. 422] cial reports and statements of IDS, its subsidiaries and affiliated companies and testimony with respect to the meaning and interpretation of such documents, (b) testimony as to the witness' knowledge of the time, manner and method of preparation of financial reports and statements of IDS, its subsidiaries and affiliated companies produced on the deposition of Ivan Hone and (c) testimony as to the witness' knowledge of the distribution of the financial reports and statements of IDS, its subsidiaries and affiliated companies, between November 11, 1948 and June 30, 1950 and between April 7, 1954 and January 20, 1956 to any of the following persons or entities:

(1) Alleghany Corporation;

(2) Allan P. Kirby;

(3) Robert R. Young;

(4) Robert W. Purcell;

(5) Frank B. Bateman;

(6) Brooks Potter;

(7) Joseph J. Anzalone;

(8) Walter W. Foskett;

(9) Henry J. Guild;

(10) Herman R. Neff;

(11) O. Henry Briggs;

(12) Andrew Van Pelt;

(13) Edward Y. Baugeard;

(14) David W. Wallace (limit to period April 7, 1954 to January 20, 1956);

(15) Thomas F. Daly, Esq., or Messrs. Lord, Day & Lord;

(16) Charles Shipman;

[fol. 423]

(17) Alvin J. Stiver or Saunders Stiver & Co. or any representative or employee thereof;

(18) Members of the Board of Directors of IDS.

Dated: March 13, 1963

Townley, Updike, Carter & Rodgers, Attorneys for Plaintiff, Alleghany Corporation, By Stuart N. Updike.

Donovan Leisure Newton & Irvine, Attorneys for Defendants Allan P. Kirby and Fred M. Kirby, By Granville Whittlesey, Jr.

Kissam & Halpin, Attorneys for Defendant Charles T. Ireland, Jr., By Leo T. Kissam, per Granville Whittlesey, Jr.

[fol. 424]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

vs.

ALLAN P. KIRBY, RANDOLPH PHILLIPS, FRED M. KIRBY, CHARLES T. IRELAND, JR., Defendants.

Before: Hon. Archie O. Dawson, District Judge.

Transcript of Hearing—March 25, 1963

APPEARANCES:

Townley, Updike, Carter & Rodgers, Esqs., Attorneys for Plaintiff, Stuart N. Updike, Esq., Howard Carter, Esq., Lee W. Meyer, Esq., of Counsel.

Donovan, Leisure, Newton & Irvine, Esqs., Attorneys for Defendants Allan P. Kirby and Fred M. Kirby, Granville Whittlesey, Jr., Esq., Roy W. McDonald, Esq., Robert M. Loeffler, Esq., Walter L. Stratton, Esq., Robert V. Dunn, Esq., John J. McCann, Esq., of Counsel.

Randolph Phillips, Defendant, pro se.

[fol. 425] Kissam & Halpin, Esqs., Attorneys for Defendant Charles T. Ireland, Leo T. Kissam, Esq., of Counsel.

[fol. 426]

COLLOQUY BETWEEN COURT AND COUNSEL
RE ISSUES TO BE TRIED

Mr. Carter: There are two different issues, as we understand it, that your Honor will eventually be called upon to

[File endorsement omitted]

decide. One, as to whether or not the defendants entered into a corrupt bargain in the fall of 1959, in connection with the release that Alleghany corporation gave the defendant Allan P. Kirby; that is the issue that we, for brevity, have been characterizing as the alleged corrupt bargain.

The second issue is whether or not in connection with the 1949-50 IDS transaction in which the defendant Kirby acquired about 24,000 shares of IDS stock in exchange for some Alleghany preferred at a time when he was president of the Alleghany and a director, as to whether or not his acquisition of the 24,000 shares of IDS was a breach of his fiduciary obligation which he owed the stockholders of Alleghany Corporation.

In that connection I might say to your Honor, just to facilitate matters, subject to the approval of the court, Mr. Updike and I have arranged for a division of responsibility and we have agreed that I would present and try the issue on the corrupt bargain and he would undertake the responsibility of presenting the issue so far as the [fol. 427] alleged breach of the fiduciary obligation is concerned.

I think for all purposes as the trial progresses your Honor will find that we are drawing a sharp line of distinction and demarcation, if you will, as to those two issues. Those are the basic issues.

The Court: Let me ask you this: As I understand it, that 1950 transaction was the subject of one of the counts in the Zenn vs. Anzalone, which was the case that was settled.

Mr. Carter: That is correct, sir.

* * * * * * *

[fol. 428] The Court: Is there a settlement agreement, whether made in the federal or state court, which would prevent the assertion of that claim now in the Zenn-Anzalone federal?

Mr. McDonald: It would be our position, because I think it is one of the undisputed facts, that the intention of the

parties in settling Zenn vs. Anzalone, was to settle what Mr. Adams, a Murchison lawyer, has repeatedly called the whole ball of wax, including Breswick vs. Briggs, insofar as it was a derivative action. We do not agree with Mr. Carter's statement of the issues. It is just a question as to when your Honor wants to hear it.

* * * * * * *

[fol. 429] The Court: Would I in this proceeding then try the 1950 or not?

Mr. Carter: You could, but if you recall when we were discussing these theories at one of our prior sessions with respect to the 1949-1950 IDS transaction you said in effect that you didn't want us, the plaintiff, to go into the merits of the 1949-1950 IDS transaction during the current trial but you also decreed on the record that if you found that the plaintiff had sustained his burden of proving that Mr. Kirby had breached his fiduciary obligation in that he failed to adduce before the referee certain pertinent documents in connection with that transaction which would have to do with a fair evaluation of the settlement, or if there was any concealment by Mr. Kirby in that connection, or if Mr. Kirby had failed to adduce before the court documents which, as a matter of law, in his possession he was duty bound to adduce, then I think what your Honor said was that you would give the plaintiff in that event an opportunity to amend the complaint and try that 1949-1950 matter.

The Court: What happens to the plaintiff in Zenn v. Anzalone and Breswick v. Briggs? What I am trying to find out is where we go if you establish this corrupt bar-[fol. 430] gain. Would we reinstate those cases and let them go ahead or do we try, with you as the attorney, this 1950 transaction?

Mr. Carter: You have a corporate plaintiff here and if you set the Alleghany release to Mr. Kirby then, since initially all of these derivative actions were ostensibly brought on behalf of the plaintiff, of the corporate entity

which is now the plaintiff, it seems to me that the plaintiff could prosecute those causes of action and it is up to some authority, presumably your Honor, to determine the extent by which Alleghany Corporation was deprived of moneys properly due its shareholders.

The Court: Is it your idea that we, in effect, have this trial divided into two parts, and that first we try whether we should set aside the release of Mr. Kirby because if that release is not set aside then nothing in the 1950 transaction can be litigated at all? If the release is set aside then you go ahead and bring up the claim on the 1950 transaction.

Mr. Carter: That's my argument.

The Court: So the first part of this trial will relate purely to the question of what you denominate as the corrupt agreement.

[fol. 431] Mr. Carter: There are two phases to this. There would be that and whether or not Mr. Kirby violated his fiduciary duty. In the latter instance we wouldn't be trying that on the merits as you have indicated. We would have the burden of convincing your Honor on that phase of it that there was a breach in duty on Mr. Kirby's part in his failure to adduce.

• • • • • • •

[fol. 432] Mr. McDonald: It is perfectly clear that under no circumstances, under either theory, do we undertake at this time to try the merits of this 1950 transaction?

The Court: I think Mr. Carter has said that.

• • • • • • • •

[fol. 433] The Court: As I understand it, Mr. Carter says that the proof to be presented by the plaintiffs in this case will be first the proof about the so-called corrupt agreement. You will do all that before you go into the proof as to the failure to adduce.

Mr. Carter: This is one of the things we want to discuss with your Honor this morning and I had a note to bring it up to your Honor.

With all due respect, I must disagree with the statement just made by Mr. McDonald because it is definitely an [fol. 434] attempt to get away from an understanding that the plaintiff believed we had with your Honor with respect to the amendment of this complaint. While it is true that we all understood that this '49-50 IDS transaction was not to be tried in this current trial on the merits, it was also definitely understood that there would be one trial with two theories being advanced to your Honor during that one trial.

• • • • • • • •

[fol. 435] Mr. McDonald: I think this is perfectly clear, but I just want to mention it on the record: Mr. Carter has indicated that in the event it ever became necessary to litigate the merits, so-called, of the 1949-1950 claim he would need to amend; we would need to amend at the same time because neither one of us has pleaded on the merits of that cause of action in these pleadings and we would have defenses which are not there.

Mr. Carter: I think that is understood.

• • • • • • • •

[fol. 436] Mr. Phillips: Then that means the '50 cause of action insofar as it is to be tried is going to be tried simultaneously or contemporaneously with the—

The Court: Only to the limited extent that we have discussed so far.

Mr. Carter: Exactly.

• • • • • • • •

[fol. 437]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR. and FRED M. KIRBY, Defendants.

PLAINTIFF'S PROPROSED STATEMENT OF ISSUES—
Filed August 7, 1963

1. Did Kirby procure by fraud an order of this Court dated December 24, 1959, vacating insofar as Kirby was concerned, an order of this Court dated October 27, 1955; an order of the New York County Supreme Court dated December 28, 1959; a judgment of the New York County Supreme Court dated February 4, 1960; and releases from plaintiff subsequent thereto by means of:

(a) A corrupt agreement with Ireland and Phillips whereby Kirby was enabled to settle his liabilities to Alleghany Corporation which had been asserted in derivative actions in this Court and the New York County Supreme Court for an amount far less than he would have had to pay but for such agreement, and Phillips and Ireland personally benefited from such agreement; or,

(b) A failure by Kirby to adduce or cause to be adduced before the State Court or its Referee or this Court or its Special Master in the *Zenn* (State) and *Breswick* litigations facts material to an evaluation of [fol. 438] Kirby's liability on claims arising out of the

[File endorsement omitted]

1950 Exchange Transaction and the fairness and adequacy of Kirby's proposed settlement in connection therewith?

2. Did Kirby nominate Phillips to the IDS Board on April 19, 1960, in fulfillment of a commitment made by Kirby to Phillips in order to accomplish a settlement of Kirby's liability in the *Zenn* and *Breswick* derivative actions?

3. Does this Court have jurisdiction to vacate an order of this Court and set aside a judgment of a State court and the releases granted subsequent thereto when such have been procured as part of a fraudulent scheme to settle derivative action liabilities asserted in both the State and Federal courts?

4. May this Court grant relief from such a fraud:

(a) By setting aside the judgment of the New York County Supreme Court entered in *Zenn* v. *Anzalone* with respect to Kirby and the releases obtained by Kirby in connection therewith; or,

(b) By enjoining Kirby from pleading such judgments and releases in bar of a separate trial in this action on the merits of the 1950 Exchange Transaction; or,

(c) By granting money damages to the corporation measured by the difference between the amount Kirby paid in settlement and the fair settlement value of the claim against Mr. Kirby in the absence of his fraud?

5. Was this Court required under Federal Rule 23(c) to hold settlement hearings in *Breswick* or *Zenn* (Federal) after due notice to shareholders in December, 1959?

[fol. 439] 6. Was there a failure to comply with the requirements of Rule 23(c) in connection with the *Zenn* and *Breswick* actions, and if so, did such failure render the judgments and orders entered in such actions void?

7. Was the 1950 Exchange Transaction void or voidable?

8. Was the settlement, as to defendant Allan P. Kirby, as it was presented to this Court and the New York Supreme Court and as ruled upon, approved and carried out, a settlement separate from the settlements of the other defendants in *Zenn* v. *Anzalone* and *Breswick* v. *Briggs*?

9. Where Alleghany has been caused by Kirby and Fred M. Kirby to expend monies in payment of legal fees and disbursements on Kirby's behalf and that of others than Alleghany and failed to disclose said payments to the shareholders of Alleghany, should Kirby and Fred M. Kirby be compelled to repay said sums to Alleghany?

10. Does the complaint allege facts sufficient to support a claim for rescission and for damages against Kirby?

11. Should Phillips and Ireland be required to account to Alleghany for the sums received by them as part of the settlement?

On June 29, 1962, pursuant to an order of this Court dated June 27, 1962, plaintiff submitted a Statement of [fol. 440] Issues of Law. We respectfully refer the Court to such Statement which is more detailed than the above statement of basic issues. We believe that the issues as set forth in the June Statement, a copy of which is annexed hereto, with the exception of those enumerated in Category C which the Court has since ruled shall be tried in a separate trial in this action, contain a proper formulation of the subsidiary, as well as the basic, issues in this action at the present time.

Respectfully submitted,

Townley, Updike, Carter & Rodgers, Attorneys for Plaintiff, Office and P. O. Address, 220 East 42nd Street, New York 17, New York.

[fol. 441]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

—against—

ALLAN P. KIRBY, RANDOLPH PHILLIPS, FRED M. KIRBY and CHARLES T. IRELAND, JR., Defendants.

ATTACHMENT TO PLAINTIFF'S PROPOSED STATEMENT OF ISSUES

Statement of Issues of Law to Be Presented by Alleghany Corporation as Plaintiff

The following statement of legal issues prepared pursuant to the order of this Court dated June 26, 1962, does not include legal issues created by defenses, counterclaims or other defensive material which may be asserted by defendants.

A. *Jurisdiction*:

(1) *Of the Court*: Is jurisdiction lost for lack of diversity?

(2) *Over the Subject Matter*: Does this Court have jurisdiction to set aside a judgment of a state court and vacate an order of this Court, when such have been procured by fraud?

B. *The Elements of the Cause of Action*:

Must both of the following elements be established to set aside or recover damages for a fraudulently induced settlement:

(1) Proof of the validity of the underlying cause of action which was the subject of an inadequate settlement; and

[fol. 442] (2) Proof of deception or a breach of a fiduciary duty which resulted in the approval and acceptance of the settlement?

C. *Issues as to the Validity of the Underlying Claim*:

(1) Was the 1950 Exchange Transaction void or voidable because the Board resolution authorizing it was adopted by personally interested directors and in the absence of a disinterested quorum?

(2) Was the purported authorization of the 1950 Exchange Transaction by the shareholders of Alleghany void at common law:

(a) by reason of Kirby's failure to disclose to the shareholders of Alleghany inside information available to him concerning the financial condition and future of IDS; or,

(b) by reason of material misrepresentations and concealments as to the purported authorization of the transactions by the Board of Directors and as to the fairness and business value of the transaction?

(3) Was the 1950 Exchange Transaction void under the Securities Exchange Act of 1934 by reason of violation of Rule 10(b)(5) with respect to nondisclosure and a scheme to defraud?

(4) Was the 1950 Exchange Transaction void under the Securities Exchange Act of 1934 and Maryland law:

(a) because the management proxies cast in favor of the transaction were void by reason of Kirby's failure to disclose, in proxy solicitation, material and relevant facts with respect to the

1950 Exchange Transaction in violation of his duties under Rule 14(a)(9); and

(b) because the 1950 Exchange Transaction consequently was not ratified by the shareholders of Alleghany?

[fol. 443] D. *Issues as to the Fraudulent Concealments in Procuring the 1959 Settlement of the Underlying Action*:

(1) Did Kirby, Ireland and Phillips in the 1959 settlement occupy a fiduciary relationship to Alleghany, its shareholders and the federal and state court?

(2) If Kirby, Ireland or Phillips occupied a fiduciary relationship to Alleghany, its shareholders or the federal and state court, did such relationship require them or any one of them to disclose:

(a) the secret agreement between Kirby and Phillips, negotiated with the aid of Ireland, to reward Phillips for advocating a settlement of Kirby's liability for a substantially lesser sum?

(b) the negotiations between Phillips, Ireland and Kirby to obtain Phillips' advocacy of a separate Kirby settlement?

(c) facts material to an adequate appraisal of the value of the claims against Kirby arising out of the 1950 Exchange Transaction?

(d) the errors of Referee Fitzsimmons as to the authorization and ratification of the 1950 Exchange Transaction?

(3) Was failure to disclose the foregoing or any one of them a fraud upon the court or upon Alleghany?

(4) Was Kirby's 1959 settlement of his liability to Alleghany on the 1950 Exchange Transaction fraudu-

lent as a matter of law by reason of its gross unfairness to Alleghany and by reason of:

(a) Kirby's misrepresentation to this Court, the state court and to Alleghany that the proposed settlement was fair and adequate?

(b) the failure of Kirby and his agents to disclose to this Court, the state court and to Alleghany the Referee's error with respect to the authorization and ratification of that transaction?

[fol. 444] (c) the Phillips' advocacy of the separate Kirby settlement?

E. *The Separate Kirby Settlement*:

On the facts to be proved with respect thereto was the settlement as to defendant Allan P. Kirby, as it was presented to the court, ruled upon, approved and carried out a settlement separate from the settlements of the other defendants in *Zenn* v. *Anzalone* and *Breswick* v. *Briggs*?

F. *Issues as to Reimbursement of Alleghany for Counsel Fees*:

Where Alleghany has been caused by Kirby to expend monies in payment of legal fees and disbursements on his own behalf and that of others than Alleghany and failed to disclose said payments to the shareholders of Alleghany, should Kirby be compelled to repay said sums to Alleghany?

G. *Issue as to the Prayer for Relief*:

Does the complaint allege facts sufficient to support a claim for rescission and for damages?.

Respectfully submitted,

Townley, Updike, Carter & Rodgers, Attorneys for Plaintiff, Office and P. O. Address, 220 East 42nd Street, New York 17, New York.

[fol. 445]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3511

ALLEGHANY CORPORATION, Plaintiff,

vs.

ALLAN P. KIRBY, RANDOLPH PHILLIPS, FRED M. KIRBY, CHARLES T. IRELAND, JR., Defendants.

Before: Hon. Archie O. Dawson, District Judge.

Transcript of Hearing—April 1, 1963

APPEARANCES:

Townley, Updike, Carter & Rodgers, Esqs., Attorneys for Plaintiff; Stuart N. Updike, Esq., J. Howard Carter, Esq., and Lee W. Meyer, Esq., of Counsel.

Donovan, Leisure, Newton & Irvine, Esqs., Attorneys for Defendants; Allan P. Kirby and Fred M. Kirby; Granville Whittlesey, Jr., Esq., Roy W. McDonald, Esq., Robert M. Loeffler, Esq., Walter L. Stratton, Esq., Robert V. Dunn, Esq., and John J. McCann, Esq., of Counsel.

[fol. 446] Randolph Phillips, Defendant, pro se.

Kissam & Halpin, Esqs., Attorneys for Charles T. Ireland, Jr.; Leo T. Kissam, Esq., Anthony J. Genovese, Esq., and Edmund K. Leach, Esq., of Counsel.

The Court: This is Alleghany Corporation against Allan P. Kirby and others.

Plaintiff ready?

Mr. Carter: Plaintiff is ready.

The Court: Defendants are ready?

Mr. Phillips: Ready, your Honor.

Mr. McDonald: Ready.

The Court: All right.

Will you be seated, gentlemen, and we will proceed.

I may say I have read the pretrial briefs. I do not think any opening statement will be needed. I have gone over the proposed statement of issues presented by the plaintiff and by the defendants. I am adopting as the statement of issues for this case the statement of issues presented by the plaintiff. They are the ones who have the burden of [fol. 447] proof. I think they have fairly stated the issues that they have got to establish, and unless it is changed by events in the course of the trial I am taking those as the statements of issues which the plaintiffs will have to establish, and those are the issues in the case.

I may say for the information of counsel, we will sit today until a quarter to one. We will adjourn then until a quarter past two for lunch. We will sit then this afternoon until 4.30. That will be generally the procedure which we will adopt during the course of the trial.

I am taking an hour and a half for a luncheon recess because I know from experience how hard it is to find a place to eat around this Courthouse.

The plaintiff may call the first witness.

Mr. Carter: Mr. Charles T. Ireland.

[fol. 448] Charles T. Ireland, Jr., called as a witness by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Carter:

Q. Are you the Charles T. Ireland who is named as one of the defendants in the instant complaint?

A. Yes, sir.

* * * * * * *

[fol. 449] Q. All right. Did you learn that Judge Dimock came down with a decision some time in the month of December of 1959?

A. You mean September.

Q. September, I am sorry.

A. Yes, sir.

Q. Now, from whom did you learn that?

A. Mr. Phillips.

Q. Was that in a face-to-face conversation or telephonic?

A. I believe it was on the telephone.

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[fol. 450] Q. Did Mr. Phillips call you?

A. Oh, yes.

Q. Was that the first knowledge you had of the publication of Judge Dimock's decision?

A. I believe so.

Q. At the time of that conversation with Mr. Phillips did you report the substance of it to Mr. Eppler?

A. I believe I did.

Q. And did you use as a medium of reporting an XYZ memorandum?

A. Not in the first instance.

Q. In the second instance did you?

A. I believe I did.

Q. And did you set forth in that XYZ memorandum a factually accurate account of what Mr. Phillips said to you and what you said to him?

A. Well, I certainly would have purported to try to do that.

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[fol. 451] Q. Did Mr. Phillips tell you in substance, (a) that there would be a resumption of the hearings before the referee and the special master?

A. Well, I can't be sure that he told me that in this conversation, because Mr. Phillips and I may have had several, but in due course I believe Mr. Phillips did tell me this.

Q. Did he also tell you in substance that when the hearings resume before the referee or the special master that Allan P. Kirby would be the first witness they would call?

A. Well, if not in this conversation, Mr. Carter, I came to know that, I think, from Mr. Phillips soon.

Q. And did Phillips say to you in words or substance that when, as and if Mr. Kirby was called at the reopening of the hearings that he would "fall on his head"?

A. Well, that phrase is a little colorful, but he certainly did not think that Mr. Kirby was going to be a star witness.

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[fol. 452] Q. After you wrote Plaintiff's Exhibit 104 in evidence did you have a talk with Mr. Eppler about it?

A. I can't recall having a talk with him on this subject; no, sir.

Q. Well, did you have a talk with Mr. Kirby about it?

A. About the memorandum or—

Q. About the memorandum. That is what we are discussing.

A. No, sir, I don't recall discussing that.

Q. Did you have a talk with Mr. Kirby about the substance of the facts contained in the memorandum?

A. Well, if what we are laboring to, Mr. Carter, is whether I called Mr. Kirby on the day that I had this [fol. 453] telephone conversation with Mr. Phillips, the answer is yes.

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[fol. 454] Q. When, keeping in mind I am talking about a period of late September of 1959, when for the first time —I am asking for a date now—were you authorized or deputized by anybody to meet officially with Randolph Phillips for the purpose of exploring the possibilities of the settlement of the derivative actions that were then pending?

A. Well, I have a lot of trouble with a date in response to that question, Mr. Carter, but on my deposition and

other depositions I believe there is testimony to my having a luncheon meeting with Mr. Daly of Lord, Day & Lord, which I would think was perhaps early in October, and that meeting with Mr. Daly was for the purpose of finding out whether it was all right with Mr. Daly if I continued these talks with Mr. Phillips to find out whether or not there is any settlement possibility.

Q. Is it your best recollection that you had this meeting with Mr. Daly in October?

A. It is a very poor recollection, but I would say it is early in the fall.

[fol. 455] Q. Well, now, let me ask you this, to help you refresh your recollection:

You were present at a meeting at Mr. Kirby's chateau in Easton over the weekend of October 10th and 11th, 1959, were you not?

A. I remember the weekend. The date I don't recall, but it was in October.

Q. Yes. And, incidentally, before we get into it, do you remember what transpired at that meeting?

A. Reasonably well.

Q. All right. Now, with that as a focal point, can you tell us datewise when you were first authorized to get together with Randolph Phillips for the purpose of exploring settlement possibilities of the derivative actions that were then pending?

A. No, sir.

Q. Was it before the Easton meeting?

A. Well, my best recollection, which is far from clear, is that I was talking with Randolph Phillips prior to the Easton meeting and obviously, as you well know, many times after the Easton meeting.

Q. Well, for your information, Mr. Ireland, I am trying to separate these two periods of September 28 through November 13th when you became vice-president of Alle-

[fol. 456] ghany, and then we will take up November 13th.

A. Onward.

Q. Onward. Now, if you cannot remember the date when you were authorized to discuss settlement possibilities with Mr. Phillips, can you tell us (a) that you did?

A. That I did what, sir?

Q. Discussed settlement possibilities with him?

A. Oh, definitely.

Q. All right. Now, can you identify for us the person in the Alleghany organization who first authorized you?

A. Well, obviously it would have had to have been either Mr. Kirby or Mr. Eppler, and I believe it was Mr. Eppler.

Q. Now, at any time prior to the Easton meeting had you discussed your authorization to carry on with Randolph Phillips with Allan P. Kirby?

A. Well, at some point I think considerably earlier than September 28th, '58, I did convey either to Mr. Kirby or to Mr. Eppler for Mr. Kirby's benefit the fact that Mr. Phillips and I had been on friendly terms for years, and did anyone want me to stop that or keep it up, and in due [fol. 457] course I came to know, I presume from Mr. Eppler, to maintain the relationship.

Now, in that sense, there is this talk about—

Q. All right, now, we know, we have the maintenance of the relationship.

Now I am asking you if it is not the fact that Mr. Allan P. Kirby authorized you to explore settlement possibilities with Randolph Phillips some time after Judge Dimock came down with his decision in September of 1959.

A. The only trouble I have with the question, Mr. Carter, in terms of total accuracy is that it may very well have been Mr. Eppler who gave me the green light to continue talking.

Q. And did you assume that when you got the green light from Mr. Eppler that you were getting the green light from Mr. Allan P. Kirby?

A. On virtually any subject.

Q. All right. And was that assumption later confirmed on the basis of personal conversations you had with Mr. Kirby?

A. Well, at least it was confirmed in this sense, that there came times when I would tell Mr. Kirby about the [fol. 458] conversations, and there was no objection to them.

Q. Can you give us your best recollection of what Mr. Eppler said to you with respect to carrying on the settlement or exploring settlement possibilities with Mr. Phillips?

A. I really have no recollection of the conversation at all except that it seems to me that in it I was asked to go see Mr. Daly, to see whether Mr. Daly had any objection, and if he did not have any objection, then my understanding was that I was to go ahead, and I believe, Mr. Carter, that this times into the luncheon with Daly about which I have testified elsewhere.

* * * * * * *

[fol. 459] Q. Without belaboring the point, Mr. Ireland, didn't you testify when you were being deposed that in that period of time, September 28, up to the Easton meeting, you had explored settlement possibilities with Randolph Phillips on five or more occasions?

A. Well, I certainly do not remember that as precisely as you do, sir, but there may well have been some conversations. I think what I was attempting to do in my deposition was to contrast quantitatively the number of conversations I would have with Mr. Phillips prior to November 13th, '59 and in relationship to the vast number of conversations thereafter. Now, within that framework you may have asked me, "Could you give us an estimate as to the number of conversations between September 25th [fol. 460] and October 10th," and I may well have come up with that answer.

The Court: And that would have been true, wouldn't it? You would have had about five in that period?

The Witness: At least that would be my recollection, sir, which is not too clear.

The Court: All right.

* * * * * * *

[fol. 461] Q. Is it not a fact, Mr. Ireland, that it was the consensus of those assembled at Easton that if the derivative litigation was to be settled that it could only be done through Randolph Phillips?

A. No, sir, I don't think it is fair to say that that was the consensus.

Q. Was there a recognition by some of those assembled that if the derivative actions were to be settled that Randolph Phillips was the avenue through which to settle them?

Mr. Kissam: That is not the fact.

The Court: You are not testifying, Mr. Kissam. The question is to the witness. He can testify to what the facts are.

A. I cannot say that I heard anyone in that room that evening or any other occasion express the thought that the only way to settle all this litigation was through Phillips.

Q. Didn't you yourself, Mr. Ireland, as of that time believe that the only way this litigation could be settled was through Randolph Phillips?

A. No, sir. I didn't know whether I believed it or not, I earlier testified, if I may finish—

Q. Please do.

[fol. 462] A. I earlier testified that I don't know of my own knowledge what the relationship was in the plaintiff group of which Phillips was a consultant. He may have been all powerful. He may have had no influence whatsoever. I did not know myself, but I did know anybody else in that group and I had known Mr. Phillips for years.

Q. You knew Brussel was an attorney, did you not?

A. I came to know that in due course.

Q. You knew Graubard was a member of the bar?

A. Yes.

Q. You knew that each of those gentlemen was representing litigations in the derivative action, did you not?

A. Yes, sir.

Q. You knew Randolph Phillips was not an attorney, did you not?

A. Yes, sir.

Q. But you knew, as you have told us, that he was a consultant, right?

A. Right.

Q. In the negotiations that followed at any time prior to the occasion you settled Mr. Kirby's separate liability with Randolph Phillips with a payment of $1,100,000, did [fol. 463] you ever talk the matter over with either Brussel or Graubard?

A. I don't think so. There is one exception in the case of Graubard which occurred years earlier and not in your question, but aside from that, I don't believe I laid eyes on Brussel and Graubard until December 18th.

Q. Did you come to believe in October of 1959 that if these derivative actions were to be settled that Phillips was the key?

A. I thought I tried to answer that a little earlier.

The Court: I think he has answered that several times.

Q. Was Mr. Wallace during the Easton meeting advocating that Mr. Kirby face up to the reopening of the litigation and get ready to testify?

A. I don't recall that emphasis. I do recall Mr. Wallace in general was on the negative side of the issue of whether or not I should continue discussions with Phillips, although not enthusiastically so.

Q. Irrespective of enthusiasm, is it the fact that at that Easton meeting Wallace expressed himself as opposed to your carrying on settlement negotiations with Randolph Phillips?

[fol. 464] A. I think it is fair to say he did.

Q. Is it fair to state that Mr. Orr also felt the same way?

A. I think a more precise estimate of it is that Orr doubted whether the continuance of the talks would do any good, and he more or less left his opinion that way. I cannot say that he flatly came out and said, "My opinion is no, they should not continue."

Q. When he wasn't asleep, did Mr. Kirby express himself aye or nay on that issue?

A. No, sir, not to the best of my recollection.

Q. At any time from the Easton meeting on, did you ever get any express authorization from Kirby to carry on the settlement discussions with Randolph Phillips?

A. At least in the sense that conversations between myself and Phillips accelerated as the fall went forward, Mr. Kirby I know was aware that they were going on and I heard no objection.

The Court: We have now reached the time for luncheon recess. We will stand adjourned until 2:15.

(Recess taken until 2:15 P.M.)

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[fol. 465] CHARLES T. IRELAND, JR., resumed.

Direct examination.

By Mr. Carter (Continued):

* * * * * * *

Q. Mr. Ireland, before the luncheon recess we were discussing the Easton meeting, as you recall.

A. Yes.

Q. At any time during that gathering did anyone volunteer the statement that Randolph Phillips could make a substantial contribution to the Alleghany Corporate affairs?

A. Yes, sir, I think that I did.

Q. Now, to whom did you make that statement?

[fol. 466] A. Well, actually I was talking to Mr. Eppler. Others may or may not have heard the remark.

Q. Now, when you made that statement to Mr. Eppler who was in the immediate vicinity? Who was within earshot, if you will?

A. Well, I think, Mr. Carter, the best that I can recall I think that Mr. Orr and Mr. Wallace probably were. At

the time the remark was made I might explain, we were outdoors on a patio of sorts, so I am not too sure how it carried.

Q. Now, was this statement which you have told us you made made at a time when you were discussing the need for recognition by Randolph Phillips?

A. No, sir.

Q. When you made that statement did you believe it?

A. For the purposes that I had in mind I did very much so.

Q. And did you think as of October of 1959 that it would be advisable for Alleghany Corporation, within its complex, to retain the services of Randolph Phillips?

A. For the purpose I had in mind, yes.

Q. And you so expressed yourself, did you not?

A. Well, I think I said something to the effect that I thought he would make a contribution.

[fol. 467] Q. By that, were you encompassing possible employment of Randolph Phillips by Alleghany Corporation?

A. Very definitely.

Q. By the way, you had discussed the possible employment of Randolph Phillips in the Alleghany complex with Mr. Phillips himself on a number of occasions, had you not, prior to October, 1959?

A. I don't recall that coming up at any time, Mr. Carter.

Q. Didn't you testify on your deposition, sir, that at least on five occasions prior to October, 1955, you and Phillips had discussed the value that he could contribute to Alleghany if he was reemployed?

A. I don't recall it now. If I may look at whatever I testified to, it might refresh my recollection.

Mr. Kissam: May we have a page for our purposes?

Mr. Carter: I will give it to you, but we want to hustle along.

The Court: That is a good thought.

Q. Mr. Ireland, as of September of 1959, didn't you believe that the return of Randolph Phillips to Alleghany Corporation would be a good thing for Alleghany?

A. I cannot pinpoint it to September, Mr. Carter.

Q. You did not hear my question, I am sorry.

[fol. 468] (Question read.)

A. What I was about to say, I cannot say as of September as opposed to October that I had any feeling about it one way or the other.

Q. Are you suggesting by that answer, sir, that in or around that time, September or October of 1959, you reached the conclusion that it would be good for Allegheny if Randolph Phillips returned?

A. Well, I think at least as of some time in October, I had in effect reached that conclusion for the purpose I had in mind.

Q. Did you so express yourself to Randolph Phillips?

A. I doubt it very much.

Q. Do you know for sure whether you did or did not?

A. No, sir, I am not sure, but I do doubt it very much.

Q. Did you express that belief at any time in that period to Allan P. Kirby?

A. We are now in the period of September or October. I doubt it very much, in fact I am virtually sure I did not.

Q. Did you express that opinion to Mr. Eppler or anybody else?

[fol. 469] A. Well, aside from this instance to which I testified to Mr. Eppler at Easton on October 10th or whatever the date was, I doubt if I expressed the thought to anyone else in September or October.

Q. When you qualify it, sir, by saying in September or October, are you suggesting that there did come a time within that period when you did express your belief in that regard to others?

A. You mean after October?

Q. Yes.

A. Yes.

Q. Whom did you express it to, whom did you convey your belief to?

A. There came a time in—

Q. I just asked you for identity. Who?

A. The trouble I am having with it is that perhaps many people—

Q. Let us see if we can hurry along and sort it out. Was Mr. Kirby among the many?

A. I happen to be thinking of a particular meeting at which I don't think Mr. Kirby was present, but the others to whom I would have expressed this thought would have included Mr. Deegan, Mr. Fitzsimmons, Mr. Eppler and perhaps Mr. Brownell and Mr. Glenn.

[fol. 470] Q. Mr. Fitzsimmons was then president of IDS?

A. Yes.

Q. Did he register vociferous opposition when you mentioned it?

A. I don't think he had any comment at all.

Q. Didn't say anything?

A. I don't believe so.

Q. What did Mr. Eppler say?

A. I don't recall what he said, if he said anything.

Q. What did Mr. Brownell say?

A. This I don't recall either.

Q. As you testify, you recall stating your belief in the regard we are discussing to those people whose names you just mentioned and you cannot recall what any of them said, if anything?

A. I can recall what Mr. Deegan said.

Q. Of the four, you can recall only what he said, is that it?

A. I believe so.

Q. Approximately when was it that you made that statement, in October, November, or when?

A. I would fix it and explain to you why I fix it this precisely, I would say on November 16th or November 17th of 1959.

[fol. 471] Q. Was that shortly before you made the first offer to Randolph Phillips on behalf of Allan P. Kirby?

A. I don't relate the thing time-wise in my mind, Mr.

Carter, and also of course I have a little trouble with the word "offer".

Q. We will come back to that. Before we get away from Easton, I don't think this record discloses just who Mr. Orr is or was. Walter Orr?

A. Walter Orr who is now deceased formerly was a senior partner of the law firm of White & Case.

Q. To your knowledge did he have a close personal professional and friendly relationship with Allan P. Kirby over a long period of years?

A. Many years, yes.

Q. During that Easton meeting, did Walter Orr advise Allan Kirby that he should testify when the hearings were reopened before the referee and the special master and not settle the lawsuit?

A. I don't recall his making that statement.

Q. You told his Honor a moment ago that there were two contending sides, two differences of opinion. Now, I take it, you were on one side and Mr. Orr was on the other, am I wrong in that?

A. That is what I tried to point out.

[fol. 472] Q. Were you advocating continuing the exploration possibilities with Randolph Phillips?

A. Yes.

Q. Was Mr. Orr opposed to that?

A. Yes, he was.

Q. Did he say in words or substance to Mr. Kirby that when the hearings reopened he should get himself prepared to testify and try the lawsuits on their merits?

A. No, sir, that is what I cannot recall his saying.

Q. Can you recall anybody saying that?

A. I really don't recall anyone saying it. What the people were discussing, Mr. Carter, was whether I should continue the talks or whether I shouldn't. Those not in favor of my continuing the talks were not necessarily saying that the lawsuits should continue and that Mr. Kirby should go on the stand.

Q. Maybe we can get it this way. Was Mr. Wallace one of those who was in favor of you not continuing the talks?

A. I would say in general, yes.

Q. Was Mr. Eppler in favor of you not continuing the talks?

A. No, he was in favor my continuing.

Q. Was Mr. Orr in favor of you not continuing the [fol. 473] talks?

A. He was in favor of not continuing.

Q. What position did Mr. Kirby take?

A. None.

Q. At the time of that meeting, Mr. Ireland, were you of the belief that if Randolph Phillips had not been badly treated and rejected out of hand, the Alleghany would not have been involved in the litigation that it was then involved in?

Mr. Phillips: I object to the form of the question.

The Court: Overruled.

A. Well, I think that I was of the belief that if Mr. Phillips had not unceremoniously departed Alleghany in 1954 that somehow or other a good section at least of the litigation that had occurred since that time might not have occurred.

Q. And when you refer to a good section, are you referring to the Breswick-Briggs litigation?

A. Honestly, in my own mind I am not making a segregation. The problem is that we had some 40 or 50 lawsuits in existence while Mr. Phillips was still with Alleghany which came to be changed to be generated by Mr. Pomerantz. Mr. Phillips' group, Breswick et al., came along later. [fol. 474] Q. Whom do you include in the Phillips' group?

A. I certainly haven't got them all, but I think of the Phillips' group by way of shorthand as including the plaintiffs, Breswick, who I understand is now dead, Graubard and Brussel, Rosen whom I have never met, and I guess that is it.

Q. When you had the belief that if Phillips had been summarily rejected out of hand, Alleghany would not have been involved in the litigation that it was then involved

in, you are talking about a period of October, 1959, are you not?

Mr. Kissam: That is not what the witness said, your Honor.

The Court: He is asking the question of the witness, not of you, Mr. Kissam. Objection overruled.

A. I am sorry, with the objection I lost the question.

The Court: If you don't understand the question, just say so.

(Question read.)

A. We are talking about my state of mind in that month?

Q. Yes.

[fol. 475] A. Yes, sir.

Q. We are talking about the litigation which induced your state of mind as litigation that was then in existence in which Alleghany was involved, are we not?

A. Yes. I think generally we can agree to that.

Q. Included in that category was the Zenn-Anzalone litigation, was it not?

A. Zenn-Anzalone is included in existing litigation. To the best of my knowledge the Phillips' group had nothing to do with it as such.

Q. Except through representation of the objectant Rosen?

A. Right.

Q. With that qualification, the Zenn-Anzalone litigation was included in the litigation that you had in mind when you had that belief in the fall of 1959?

A. Yes, sir.

* * * * * * *

[fol. 476] Q. Okay. When the Easton meeting terminated, what was your understanding of the responsibilities, if any, that you were to assume from that point forward?

A. Well, so far as the meeting itself was concerned or the conclusion of it, I came away from it with no understanding at all as to whether I should continue my talks

with Mr. Phillips or whether I shouldn't? As I have described, there were two people present in favor, two people against, and the only man whose opinion meant anything had not spoken, so that as of the end of that meeting I did not know whether I should proceed or whether I shouldn't.

Q. All right. Now, was there a period subsequent to the Easton meeting where the man who had to make the decision did speak?

A. I don't recall ever hearing directly from Mr. Kirby that I should proceed with the talks. There came a time, however, when I did recommence the talks, and I know that I would not have recommenced them without at least authority from Mr. Eppler.

Q. All right. Was it from Mr. Eppler that you received the authority to continue the talks?

[fol. 477] A. That would be my best recollection, Mr. Carter.

Q. Now, did Mr. Eppler tell you, in words or substance, that he was authorizing you to continue the talks with the full knowledge and approbation of Allan P. Kirby?

A. I don't recall his telling me that, Mr. Carter. I just simply assume that I would not have gone forward without Mr. Eppler's okay and because, in fact, I did go forward.

Q. Now, can you give us within a reasonable degree of certainty the time when you, as you say, went forward?

A. Well, if the Easton meeting were on about October 10th or October 11th I would say that to the extent of my recollection now that I went forward awfully slowly between October 10th and well, at least November 13th, and between November 13th and December 1 we were involved virtually night and day with Mr. Sonnabend, so that the actual bulk of the conversations between myself and Mr. Phillips would have occurred after December 1.

Q. Now, Mr. Ireland, I wasn't asking you with respect to the speed or quantity of the conversations. I was trying simply to establish from you with some degree of certainty

[fol. 478] the date, the approximate time when you got the green light to continue these negotiations with Randolph Phillips.

A. I can't fix it with any precision at all, Mr. Carter. I am sorry.

Q. Now, some time immediately after Judge Dimock's decision did you prepare for Mr. Kirby a list of seven questions that pertained to his potential liability in the derivative lawsuits that were then pending?

A. Well, there came a time when at Mr. Eppler's request I prepared a series of points, a list of points which were the product of my thinking, if you will, and Mr. Eppler's, concerning the instant litigation, then-instant litigation which I sent Mr. Eppler.

Q. Now I show you this document which has been in this record as Plaintiff's Exhibit 107 for identification and ask you if you prepared it.

A. I believe I did.

Q. And did you transmit it to Mr. Eppler?

A. Well, I don't have any recollection of that, but I am sure I would have.

Q. And did you understand that you prepared this document, Plaintiff's Exhibit 107 for identification, at Mr. Eppler's request for Mr. Allan P. Kirby?

[fol. 479] A. I prepared it for Mr. Eppler at Mr. Eppler's request. As to exactly what Mr. Eppler was going to do about it, or do with it, I don't know, but Mr. Eppler had expressed to me on several occasions an enormous amount of concern that Mr. Kirby did not fully understand all aspects of the pending litigation.

Q. By the way, when you prepared this 107 for identification you were still secretary of Alleghany?

A. No. I was secretary to the New York Central.

Q. I beg your pardon, the New York Central; were you not?

A. Yes.

Mr. Carter: I will offer this in evidence, if the Court please.

The Court: Received in evidence.

(Plaintiff's Exhibit 107 received.)

Q. Now, when you said, Mr. Ireland, in Plaintiff's Exhibit 107 in evidence, "Since Alleghany has spent 3½ million dollars in legal fees by inconclusively defending causes directly or indirectly emanating from Randolph Phillips," was that the fact?

A. Well, it is obviously a matter of opinion, I guess, Mr. [fol. 480] Carter, but I believe that in the period from '54 into '59 that the legal expenditures were in that neighborhood.

Q. And when you say in this exhibit "I would suggest that APK, for his own protection, request a signed memorandum from Lord, Day & Lord and David Wallace setting forth their answers to the following questions," was it the fact that you were suggesting that Mr. Kirby get a signed memorandum from Lord, Day & Lord?

A. Well,—

Mr. Kissam: Excuse me, doesn't that speak for itself, what he suggests? I object.

The Court: Well, change it.

Did you have in mind when you wrote that that is that you wanted them to do?

Is that what you have in mind?

Mr. Carter: Yes, your Honor.

The Court: All right.

The Witness: If it so states, and I have agreed that I have written this, why, that is what I had in mind.

Q. Now, as a matter of fact, Mr. Ireland, you were the author of the questions 1 through 7, inclusive, were you [fol. 481] not?

A. Not all of them, sir, no. I can't tell you now which ones I am not the author of, but I recall clearly that this was a joint product of Mr. Eppler and myself.

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Q. Did you fully expect or were you so informed that pursuant to the questions outlined in Plaintiff's Exhibit 107 in evidence that Mr. Kirby would address a letter to Lord, Day & Lord requesting answers to those seven questions?

A. No, sir. I had no anticipation as to what would happen.

Q. Well, you know as a fact that such a letter was written to Lord, Day & Lord, do you not?

A. I came to know that, but I believe it was considerably after the event.

Q. Well, when you talk in terms of considerably after [fol. 482] the event, you are talking in days, aren't you?

A. I am not sure, sir.

The Court: What event are you talking about, Mr. Carter?

Mr. Carter: The event—

The Court: In the letter or what?

Mr. Carter: Your Honor, I assume he is talking about the event, meaning the date of the composition of Plaintiff's Exhibit 107 in evidence, which is dated, I believe, September 30, 1959.

The Witness: I don't notice any date on it at all.

The Court: I didn't notice any date when I read it. There is a date stamp on it of October, some October date, but I don't know what that means.

The Witness: There is an October 13th up here, Mr. Carter.

Mr. Carter: That has been identified, your Honor, as will be brought out in Mr. Eppler's deposition. That is his date stamp on it.

The Court: That is somebody's date stamp. All right.

Q. All right, when you say "considerably after the event," Mr. Ireland, maybe I was confused. When you [fol. 483] used the term "event," were you talking about the composition of that document 107?

A. No, sir. I think that is where the confusion is.

Q. I am sorry.

A. I thought you meant a subsequent letter which I later understood came into existence from Mr. Kirby to Lord, Day & Lord.

Q. All right. Now, did you learn that some time subsequent to the preparation of Plaintiff's Exhibit 107 in evidence, Mr. Kirby addressed a letter to Lord, Day & Lord containing those seven questions?

A. I came to know some time after the event that he addressed a letter to Lord, Day & Lord which I understand from somewhere—it may even be understanding it from reading other people's depositions in this case—substantially followed the questions indicated in here. I am not sure of my own knowledge to this date whether I have ever seen the letter.

* * * * * * *

[fol. 484] Q. Were you told in substance that you would succeed Wallace?

A. I don't know whether anyone put it to me that flatly, but I was told to be at the executive committee meeting. I was told that the chances were the action was going to be with respect to Wallace and therefore it seems to me that I assumed that I was going to be elected.

Q. In fact, that is what happened, was it not, and on November 13th, Wallace was ousted and you were made vice president of Alleghany, that is right, is it not?

A. Yes.

* * * * * * *

[fol. 485] Q. On November 18th, will you tell the Court, so that I won't be characterizing, the substance of what you said to Randolph Phillips with respect to this compromise?

The Court: On November 18th, about then?

[fol. 486] Mr. Carter: That's right.

A. Aside from the fact that I am not sure of the date, but approximately there, there came a $900,000 meeting.

I made a suggestion to Mr. Phillips pretty much in the same tone as I have suggested here, namely, how does 3 times $900,000 sound to you, and I don't recall what his response was on that, but historically, looking back on it, inasmuch as we did not arrive any place with $900,000, he must have rejected it.

Q. Is this the extent of your memory of that conversation?

A. Either in this section or one very closely in time associated with it, by which I might even mean hours or days, I offered or tried to offer Mr. Phillips a consultantship. Mr. Phillips turned that down rather promptly, and that is all I recall on that.

The Court: What did you say about the consultantship and what did he say?

The Witness: Well, I suggested to Mr. Phillips, I believe, that I would like to have him on the team as a consultant. What I meant by consultant was that I wanted him very much around for Sonnabend or any future Sonnabends. To my surprise, he reacted rather sharply to that [fol. 487] and said he thought this would be an improper suggestion in relationship to the lawsuits. The lawsuits in my mind in terms of the consultantship were not connected, but in any event he said this was an improper suggestion, he thought, and cut me off very rather sharply.

The Court: How did you make the offer? Was any figure mentioned for the consultantship?

The Witness: My recollection is, and I am well aware Mr. Phillips' recollection is different, my recollection is he cut me off so sharply that we did not get to money in that session.

Q. Mr. Ireland, are you telling this court that you did not suggest to Mr. Phillips in connection with this consultantship offer that it would be for ten years at $45,000 a year, $15,000 of which was to be contributed each by Kirby, Murchison brothers and Young?

A. So far as I am concerned, Mr. Carter, any consultantship I was talking about was in connection with Alleghany Corporation. The record is replete that I represented not the Murchisons or the estate of Young.

Q. Do you have in mind, first, is it your recollection that this consultantship which you were offering Phillips was in the Alleghany complex?

[fol. 488] A. Certainly.

Q. Prior to the time you offered him the consultantship, had you cleared it with Allan P. Kirby?

A. Well, I had at least cleared it with Mr. Kirby in this sense, as of November 15th or 16th, Sonnabend had announced the proxy fight. I had virtually no stock at all. Mr. Kirby at that time was very inexperienced in these matters and I went to him and said in effect, "I have to get a staff together. I want to get Deegan, Kissel, I want to get this and that, and, by the way, I want to get Phillips too."

Q. What did Mr. Kirby say?

A. In effect his reaction was "Get anybody you need."

Q. Did you understand him when he said "Get anybody you need" that it would be all-inclusive, including Randolph Phillips?

A. He did not say no, and as far as I was concerned I wanted him.

Q. Is it your testimony, Mr. Ireland, that at no time during that conversation with Phillips were figures mentioned?

A. As I testified on my deposition, Mr. Carter, I believe Mr. Phillips cut me off too promptly for me to get to it.

[fol. 489] Q. And you read his testimony, did you not?

A. I read it in that respect.

Q. Do you realize Mr. Phillips testified that you offered him a consultantship job for ten years at $45,000 a year?

A. Yes.

Q. Have you discussed Mr. Phillips' testimony with him since you both testified in depositions?

A. I don't believe so.

Q. Have you tried to match recollections on it?

A. No, sir.

Q. Isn't it a fact, Mr. Ireland, that you made this offer of a consultancy to Mr. Phillips on the very same day and the very same time you were offering him the 3 times $900,000?

A. It could be that this all occurred in one meeting, but I am not sure of that.

Q. Will you deny that it was simultaneously that you were making the offer of 3 times 900, as you put it, plus a consultancy to Randolph Phillips?

Mr. Kissam: I object to the form of the question.

The Court: If the witness understands it, he can an-
[fol. 490] swer it.

The Witness: It came in a little fast, your Honor.

(Question read.)

The Court: Was it all at the same time?

A. Certainly, if it was not at the same meeting, in all likelihood it happened the same day.

Q. Could it be, Mr. Ireland, that it was after Phillips rejected the 3 times $900,000 and you came back to him and offered him the consultancy, is that possible?

A. It is impossible in my mind, Mr. Carter, because the two elements were not connected, 900,000 had things to do with the litigation. Consultantship had things to do with Sonnabend and potential Sonnabends.

Q. Is it your testimony and your belief, Mr. Ireland, that in the context of what you have just told us here that when you were making this offer of a consultancy to Randolph Phillips that you were not trying to influence his judgment so far as your future settlement negotiations were concerned?

A. Not so far as I was concerned.

Q. Did you as a lawyer think under those circumstances, in the position of the parties, with Phillips representing

[fol. 491] the plaintiffs and you representing Allan P. Kirby that it was right and proper for you under those circumstances to make him that offer?

A. I saw absolutely nothing wrong with it in the sense that I wanted Phillips on the team in the open working so far as I was concerned right from November 18th, if that is the date, onward in Alleghany.

Q. So far as you know, was that Mr. Kirby's feeling about it too?

A. It certainly would have been embraced whether he thought about it or not in his direction to me to get anybody I need to hold off Sonnabend.

Q. Coming back to November 18th again, Mr. Ireland, what authority did you have to offer Randolph Phillips $900,000 on behalf of the Murchisons?

A. None.

Q. What authority did you have on November 18th to offer $900,000 on behalf of the Young estate?

Mr. Kissam: I am going to object to this. Mr. Ireland has said not in the form of the offer—

The Court: I have listened to the testimony. He was not making an offer, he was saying "How would that affect you?" I know it, why take up the time of the record [fol. 492] with those objections. The witness knows what he has testified to.

(Question read.)

A. None.

[fol. 493] Q. But you did have authority from Mr. Kirby?

A. Mr. Kirby had told me it was all right to start suggesting 900,000.

Q. Now, certainly we are clear, Mr. Ireland, that at that time you had no authority from the Murchison brothers to offer Mr. Phillips, if you did, $15,000 a year for ten years of money to be paid by them, did you?

A. I would say that was absolutely certain.

Q. And the same thing would be said for the Young estate?

A. Yes, sir.

Q. Well, now, would you say the same thing for Mr. Kirby?

A. Mr. Carter, all I can tell you on this is that so far as the consultantship was concerned, what was in my mind was this:

I was seeking to hire Mr. Phillips for Alleghany.

Q. And were you seeking to hire him for Alleghany at the same time you were trying to negotiate out a settlement with him of these derivative suits that had cost Alleghany by your own statement three and a half million dollars?

[fol. 494] The Court: The answer, of course, is yes. We have covered this time after time.

Q. Now, at any time, Mr. Ireland, and I am thinking particularly of the 22nd of December of 1959, did you disclose to Judge Dimock or did you tell Judge Dimock that you had offered Mr. Phillips a consultantship?

A. I certainly think not.

Q. At any time did you tell that to or inform Judge McGivern?

A. Certainly not.

Q. Now, at or about that time was it made clear to you by those representing the Young estate and by those representing the Murchison brothers that under no circumstances would they contribute anything more to a settlement other than what they were committed to in the basic settlement?

A. Well, I do not believe, sir, that is a hundred per cent true. I think I could not give you an unqualified yes on that.

Q. Well, on November 18th or thereabouts, immediately thereafter, was it made clear to you that the Murchison brothers would not pay any additional money to settle these lawsuits?

[fol. 495] A. Well, I think the answer to that is no, but what I am thinking of, Mr. Carter, is the conversation tele-

phonewise I had with John Murchison, and I am unable to fix the date of it.

Q. All right. Now, that date is of some importance. Would you tell his Honor, if you can, when that date was with relation to November 18th?

A. Well, that is the problem I am having in answering your other question. It was after, I would say, the middle of November. It was after Sonnabend came into the open. It was before Sonnabend folded his tent, but within that area, your Honor, I can't fix it.

The Court: And what was the conversation with John Murchison?

The Witness: I was put on the telephone with John Murchison by Mr. Eppler and Mr. Murchison, in substance, said to me that he certainly hoped that I understood that in these conversations he had heard I was having with Mr. Phillips that I certainly was not representing the Murchison brothers. I told him that I certainly knew I was not representing the Murchison brothers, but now that he was on the phone with me, what were their thoughts [fol. 496] about contributing anything further to a settlement, and he said something to the effect that they had not thought seriously about a settlement, but that it might be worth something more to them—it might be worth something to them to contribute more to the settlement if as a result of that their IDS recapitalization plan could go through.

Q. As a result of that conversation did you understand from John Murchison that they were not interesting in paying any more money?

A. No, sir. That is the trouble I am having. I did not understand that.

Q. Well, when—give us a date when you came to that understanding.

A. That is, the understanding that they did not want to pay any more money?

Q. That they were not going through with any settlement. That is what I am talking about.

Mr. Kissam: I have to object, your Honor, to that question.

The Court: He did not ask you the question, Mr. Kissam.

Mr. Kissam: No, but I am still objection.

The Court: Maybe you are, but it is just wasting time. [fol. 497] Your objection is overruled. Let the witness answer. The witness is the one who was there, not you.

A. May I have that again, your Honor?

The Court: Read the question.

Mr. Carter: I will rephrase it to save time, your Honor.

The Court: All right, rephrase it.

Q. Mr. Ireland, did there come a time in the fall of 1959 when you had knowledge of the fact that the Murchisons would not contribute any additional money to a settlement of the derivative actions?

A. Well, there came a time in the fall of '59, Mr. Carter, when I understood that the Murchison brothers and the estate of Mr. Young were not interested in joining in a tripartite settlement to the tune of 900,000 apiece.

Q. All right. Now, when was that? That is all I am trying to ask you, sir.

The Court: You have taken a long time to get there.

Mr. Carter: Yes. Well—

A. It is very difficult for me to fix it, sir, but I would say early in December or late November.

* * * * * * *

[fol. 498] Q. After Phillips rejected the 900,000-dollar, three times 900,000-dollar offer, I think is the way you put it, did you come back to him and resume negotiations?

A. Oh, in due course I resumed these discussions with him, yes.

Q. And is it fair to state that when you resumed the discussions with him you were resuming them on behalf of

Allan P. Kirby as an individual and as a defendant in the derivative actions?

A. Well, I don't know whether the first talks that I would have had with Mr. Phillips that that would have been so. My problem is that I cannot quite fix as of what time it became established that the Murchisons and the estate of Young did not want to participate. Certainly after that was established I had to be talking on somebody's behalf, and it had to be Mr. Kirby.

* * * * * * *

[fol. 499] Q. All right. Now, is there any doubt or do you want to leave us with a doubt that Phillips was acting in an unauthorized capacity?

A. That is not what I am trying to leave with you. What I am trying to leave with you is this:

When the million one figure was arrived at Mr. Phillips told me that he had been overruled in connection with the million one by presumably Graubard and Brussels, and that he would not have accepted it.

Q. Well, now, Mr. Ireland, isn't it the fact that on an occasion prior to the retention of Donovan, Leisure that you, acting on behalf of Mr. Kirby and Phillips acting on behalf of the plaintiffs in the derivative actions, had arrived at an understanding that if Mr. Kirby paid a million [fol. 500] one he would be relieved of his individual liability in the derivative actions?

A. It is, I am afraid, not a fact.

Q. Well, is it a fact that you, prior to the time you went to Donovan, Leisure, you in your representative capacity, and he in his had arrived at a meeting of the minds with respect to a dollar figure?

A. Well, taking your question as your Honor instructed me to do this morning, in terms of substance, I think the answer to it is yes.

Q. Now, did that encompass a meeting of the minds in which Mr. Kirby was to pay an additional one million one hundred thousand dollars to settle his individual liability?

A. If he could.
Q. Yes, if he could.
A. If he could.
Q. Was that satisfactory to Randolph Phillips?
A. Well, he told me it was not.
Q. At the time you arrived at a meeting of the minds, was it satisfactory to him?
A. What he told me, Mr. Carter, was that it was not satisfactory to him, but that he had been overruled by his [fol. 501] principals and that was it.

The Court: And it was satisfactory to them, I take it?
The Witness: Yes, sir.

Q. And then he acquiesced, is that it?
A. Well, nothing happened, so I assume.
Q. What do you mean, nothing happened? Didn't you?

The Court: Don't argue with him.
Mr. Carter: Excuse me.
The Court: I understand what he is saying.

Q. Didn't you and Phillips, after you had arrived at the one million one hundred thousand-dollar figure from Mr. Kirby, discuss who would be good counsel to be substituted for Lord, Day & Lord to represent Mr. Kirby's interests?
A. Yes, I think we did.
Q. Yes. Now, when did you have that discussion with Mr. Phillips?
A. Well, I can't fix it, Mr. Carter, other than by deduction, I guess, which may be unacceptable, but I don't think I would have had that discussion with him until such time as I knew that Lord, Day & Lord could not act.
[fol. 502] Now, I imagine in the record somewhere it is established when that happened.

The Court: Why could they not act?
The Witness: Because, sir, they finally told me, by which I mean Mr. Daly finally told me that they felt that they had a conflict of interest position as between Mr.

Young and the estate, I mean the estate of Mr. Young and Mr. Kirby.

Q. Mr. Ireland, Mr. Daly did not make that disclosure to you until Lord, Day & Lord had been substituted out, isn't that the fact?

A. He did not make that disclosure?

Q. That's right.

A. That is absolutely not the fact.

Q. Well, now, with relation to that December 18th which you have in your mind as a Friday, how long before that Friday, December 18th, was it that you and Phillips had this discussion about getting a new counsel for Mr. Kirby?

A. Well, I would have to guess, Mr. Carter, but I would say it was probably in the early part of that week.

Q. Now, at that time you knew, of course, that a tripartite settlement, so far as the Young estate and the [fol. 503] Murchisons were concerned, was out, didn't you?

A. Well, it seemed clearly to be.

Q. Yes, and you knew at that time that as far as money was concerned the plaintiffs had indicated that a million one would be satisfactory to settle Mr. Kirby's individual liability, didn't you?

A. Yes, sir.

Q. And, of course, I take that that was satisfactory to Mr. Kirby, wasn't it?

A. Well, painfully, yes.

Q. Yes. Well, now, what standards did you use in arriving at the one million one hundred thousand-dollar figure with Mr. Phillips?

Mr. Phillips: I object, your Honor. The question assumes that standards were used. Improper as to form.

The Court: The witness is able to answer that, Mr. Phillips. A lot of people use standards. He knows what standards are. He can answer, if he can. If he can't, he can say so.

A. Well, I can only answer, sir, that I don't believe I was applying any standards.

The Court: That is an answer.

[fol. 504] Q. In this conversation you had with Randolph Phillips did he suggest the name of Carl Newton to you?

A. Yes, I believe he did.

The Court: Let me just interject there.

Mr. Carter: Yes, sir.

The Court: At the time you discussed getting Carl Newton in this place of Lord, Day & Lord had you already known by that time that Lord, Day & Lord were withdrawing or did you learn about that afterward?

The Witness: Well, as far as I was concerned, sir, I was not talking about any other law firm until I knew from Mr. Daly that Lord, Day & Lord could not act.

The Court: Could not act, so this conversation about Carl Newton was after you had learned that Lord, Day & Lord could not act.

The Witness: Yes, sir, that is why I suggested the date of the departure as a form from which we could deduce the time of the—

Mr. Carter: But, your Honor, it is the contention of the plaintiff here, and we will so prove, that Lord, Day & Lord knew absolutely nothing about it.

The Court: All right, you can prove it. I just want to [fol. 505] find out what the witness had in mind.

Q. After Phillips suggested Carl Newton to you, did Phillips call Carl Newton?

A. Well, there came a time that he called him. At least I am sure that he called Mr. Newton before I talked to Mr. Newton.

Q. And was that on the 9th of December of 1959?

A. Not to my knowledge, sir. That is too early.

The Court: Did he get the forwarding fee?

The Witness: Not that I know of, sir. It has worked out well enough otherwise.

Q. Did you go down to see Mr. Carl Newton after that conversation with Phillips?

A. Yes.

Q. Was Phillips with you?

A. Initially, yes.

Q. Did you tell Mr. Newton that you had arrived at a money package to settle Mr. Kirby's individual liability in the amount of a million one?

A. I don't think that in this first conversation with Mr. Newton, although I am far from sure on this, I don't think that I mentioned the million one figure. I think we were there or I was there for the purpose of finding out whether [fol. 506] they could represent Mr. Kirby.

Q. Well, now, after you found out, so to skip a lot of details, after you found out that they would undertake that representation of Mr. Kirby, did you tell Mr. Newton and Mr. Teitelbaum that you had arrived at an understanding with Phillips on the million on figure? Simple as that.

A. Well, at least I told them that the million one is the money part of it.

Q. All right, now, at that time was Mr. Kirby chairman of the board and president of Alleghany?

A. Yes, sir.

Q. And, of course, you knew, I take it, and he knew that this million one that he was to pay was to go back into the treasury of Alleghany Corporation?

A. Well, at least I knew it and I assume he did.

Q. And I assume you also knew that this was a settlement of claims brought against Mr. Kirby by minority shareholders of Alleghany, didn't you?

A. Yes, sir, and others, of course.

Q. The referee, Robert J. Fitzsimmons, had set a hearing down for December 16th, had he not, December 16, 1959?

A. Well, I knew a hearing was coming, but I don't [fol. 507] think I knew of it as December 16th. I had an idea it was commencing in February of 1960, but I may be very wrong.

Q. You don't know what disclosure, if any, was made to the referee if there was a hearing on December 16, 1959, do you?

A. I don't even know there was one, sir.

Q. When you arrived at the Donovan, Leisure office on Friday, December 18th, did you arrange to—

Mr. Carter: Withdraw that.

Q. Up to that point had you discussed the settlement or the compromise of the derivative actions with Mr. Brussel at any time?

A. I don't believe so. I don't think I ever met him until December 18th.

Q. We know, you told us you met Graubard, Mr. Graubard some years before, but what I would like to find out is if at any time between September of '59 and December 18th of '59 you discussed the compromise of the derivative actions with Mr. Graubard?

A. I don't believe so.

Q. Now, did you assist in the preparation of the stipulations of substitution in the Donovan, Leisure office?

[fol. 508] A. Well, I don't think you can say I assisted. I was present when they were being put together.

Q. Did you lend manual assistance to the preparation?

A. No, sir, I don't think so.

Q. Well, did you lend manual assistance to the transmission of those executed stipulations of substitution to the firm of Lord, Day & Lord?

A. I not only lent transmission, I took them over.

Q. And when you took them over, was that the first knowledge that Thomas F. Daly had that he was being substituted out of that case?

A. Well, he didn't even have it immediately then because I delivered them to Mr. Brownell.

Q. Well, if I substitute Brownell for Daly, what would your answer be?

A. I think that was the first time that they knew.

The Court: So, in effect, you are saying, Mr. Ireland, that you had gotten Donovan, Leisure in before Lord, Day & Lord had gotten out.

The Witness: Well, as a matter of minutes, your Honor, yes. I mean, this all happened the same day.

[fol. 509] The Court: Yes, but the first time they knew they were out was when the substitution came over signed by Donovan, Leisure, is that it?

The Witness: I believe that is right.

The Court: When did you first hear about this conflict of interest point, on that day or when?

The Witness: Oh, no, earlier.

The Court: How does that reconcile with what you told me? I mean, did they say they wanted to get out before?

The Witness: No, sir. The conflict of interest point came up this way:

There came a point of time when I asked Lord, Day & Lord whether they would furnish Mr. Kirby an opinion as to whether he could settle separately. The answer to that question was what brought up the conflict of interest point in that Mr. Daly told me that they did not feel they could give Mr. Kirby, even give him such an opinion.

The Court: I see. But it wasn't that they were not able to represent Mr. Kirby on the settlement.

The Witness: Well, what it really came down to was they could not represent Mr. Kirby in anything other [fol. 510] than a tripartite settlement.

The Court: I see.

Q. Now, Mr. Ireland, during your negotiations with Mr. Phillips in the fall of 1959, to your knowledge, did Mr. Phillips obtain a memorandum from Mr. Graubard on the subject of the right of a joint tort feasor to settle his liability separately?

A. Well, I think he did, although, as I sit here, I am not sure of that.

Q. Were you present over the weekend at the Donovan, Leisure offices? I am talking about the 19th, Saturday, the 20th, Sunday, the 21st, Monday.

A. Yes, sir.

Q. And did you put in long hours in consultation with Mr. Phillips and Mr. Brussel and Mr. Graubard and others?

A. Yes, sir.

Q. Was Mr. Kirby there all day Sunday, December 20th?

A. No, sir.

Q. Was he there for a substantial period of time after 12 noon on Sunday?

A. Well, to get right to it, I think Mr. Kirby showed up in the office—I am guessing a little bit now—but I would [fol. 511] say four or five in the afternoon and stayed until perhaps eight or nine.

Q. And did he stay up on the 16th floor?

A. Well, it was not the main floor of the firm. I do not remember which one it was. But the 15th floor is the main floor of the firm and he was not on that floor.

Q. Let me put it this way:

Was he alone? Was he upstairs away from Phillips and the rest of them?

A. Oh, yes.

Q. And is it the fact that he refused to meet with Randolph Phillips during that afternoon he was there and evening?

A. Well, in fact, he did not. I would hesitate to say he refused because I do not think anyone suggested it, but he did not meet with him.

Q. All right. Now, at any time during that weekend did you disclose to Mr. Newton or Mr. Teitelbaum that on or about November 18, 1959 you had offered Phillips this consultantship?

A. No, sir, I do not think so.

Q. Were you in court on December 22nd when the matter was formally presented to Judge Dimock?

[fol. 512] A. Yes, sir.

Q. Were you present when Mr. Adams objected to the settlement on behalf of the Murchisons?

A. Yes.

Q. Were you present when Mr. Daly objected to the settlement on behalf of the Young estate?

A. Yes, sir.

Q. Can you tell us of your own knowledge, that they both pleaded that the settlement was a surprise to them?

A. Well, I think that Mr. Adams did, but I do not have any clear recollection of what Mr. Daly had to say, nor, indeed, is my recollection too clear about Mr. Adams, but I think there was some point about—my recollection is it was not so much a matter of surprise as it was he felt he had very little time in which to decide.

Q. And did he also say that he had very little notice or no notice at all that Mr. Kirby had settled his individual liability, in effect, behind the backs of his co-defendants?

A. Well, I remember a fairly colorful speech to that general effect, I believe.

[fol. 513] Q. And did Mr. Adams represent to the Court that he found out for the first time about Mr. Kirby's settlement of his own individual liability on the 21st, that is, December 21st?

A. I don't recall that he did. I rather doubt that I heard that, because Mr. Kirby advised John Murchison about all this on December 18th. However, I don't really recall.

Q. You say Mr. Kirby advised John Murchison about this on December 18th?

A. I think it was about the 18th or perhaps the 19th.

Q. Who told you that?

A. Well, I believe it was Mr. Kirby.

Q. When?

A. I believe shortly after the phone call, I think he made it from his Morristown office to Texas.

Q. Did he tell you what he said to John Murchison allegedly and what Murchison said to him?

A. I think in substance.

Q. What did he say?

A. As I recall it, Mr. Kirby told me that he called John and said it looked as though maybe he may be able to make a separate settlement of these losses, and John told [fol. 514] him at the time, congratulated him, and in effect said, "Best of luck."

Q. That is your recollection of what Mr. Kirby told you?

A. In the main.

Q. Did Mr. Kirby ever tell you about the meeting he had with Mr. Eppler in Mr. Eppler's office on the 22nd of December?

A. No, sir.

Q. Did you ever have occasion prior to the end of December, 1959, to discuss with Eppler the prospects of Phillips being a director of IDS?

A. Prior to what date?

Q. December 31, 1959.

A. No, sir.

Q. Alleghany had a board meeting on December 29, 1959, did it not?

A. If that is the date of record, yes. We had one just before the end of the year.

Q. Did you present this settlement to the Alleghany board of directors?

A. Well, I was present, but I think it more accurate to say that Mr. Teitelbaum presented it.

Q. Was anything said to the directors other than a [fol. 515] presentation of the facts or the facts of the settlement?

A. No, sir, not that I know of.

Q. To your knowledge did Mr. Teitelbaum recommend this settlement to the board of directors?

A. I don't recall specifically recommending or not recommending it. I do recall that there was a general atmosphere in which Mr. Teitlebaum participated that this was a fine thing, but I can't hear him stating in any sense a formal recommendation.

Q. Did you participate in that feeling that this was a fine thing?

A. I thought it was maghificent.

Q. Did you have any factual standards upon which you base that feeling of magnificence?

A. Well, if you want to use as the factual standard the thought that for approximately five years Alleghany had

not been able to conduct any of its business, actually what it had been for five years was sort of a retainership for law firms, it had practically no chance to move forward whatsoever, and here came a settlement which, among other things, produced three million dollars into the treasury of Alleghany, returned control of IDS from the Murchison brothers, to whom it probably never should have gone in [fol. 516] the first place, back to Alleghany, and perhaps more importantly than all of these things it allowed or at least it would have allowed, if subsequent events had not come along, it allowed Alleghany once more to have the opportunity of becoming a living, breathing corporation. And that is what I mean, Mr. Carter, when I say the settlement was magnificent.

Q. By your own admission, it cost Alleghany Corporation over three and a half million dollars to defend these lawsuits over a five-year period.

A. It was very substantial, I don't recall the exact figure now.

Q. In view of the nature of the claims which were made against Mr. Kirby and the liability asserted against him, the liability claims against him by shareholders, do you think it was proper for Mr. Kirby, who was then chairman of the board and president of Alleghany, to settle those claims by the payment of $1,100,000 without any opinion, any impartial opinion as to the validity or the equity or the justice of that settlement?

A. Well, I beg your pardon, Mr. Carter, I thought he had such an opinion and, in effect, from Referee Fitzsimmons.

Q. And did you know that Referee Fitzsimmons had [fol. 517] been overruled by Judge Dimock?

The Court: That is not correct. I know enough about the record to know Judge Dimock did not overrule, he simply said it would be opened up for further testimony.

Mr. Carter: Judge Dimock sent it back for a fairer evaluation.

The Court: On any further testimony, that is not an overruling. He simply said, "We will open it up for further testimony."

Q. Did you recommend to the Alleghany board that they approve that settlement?

A. I don't think I actually recommended it. They could have looked at my face, however, and concluded that I was all for it.

Q. Were you also for the additional compensation that they voted you at that meeting as a reward for your efforts?

A. I did not know about it at the time. When I heard about it, I greeted it with total enthusiasm.

Q. Was it the sum of $30,000 to be paid over a ten-year period at $3,000 a year?

A. No, sir, it was not.

Q. How much was it?

[fol. 518] A. Just to save a little time, it was $10,000 a year for three years as counsel to the corporation.

Q. That was on top of your regular annual compensation?

A. Yes, sir.

Q. Was that resolution offered by Mr. Kirby as a reward for your efforts in producing a compromise of the derivative litigation?

A. I don't know that of my own knowledge, I was not at the board meeting at that time.

Q. You heard that, though, did you not?

A. Well, it was announced to me later by Mr. Kirby as chairman, but I don't know to this day who moved it.

* * * * * * *

[fol. 519] The Court: Are you through with the witness?

Mr. Carter: Yes.

Now, your Honor, I think Mr. Updike might have a few questions of this witness, and I am sure he will be brief, with respect to the '49 IDS transaction.

The Court: Well, I think the '49 IDS transaction is sort of in the far distant outfield in this case unless you can

prove the corrupt bargain, because the general release would bar that. But if Mr. Updike wants to ask some questions we will take a five-minute recess and then we will hear him.

* * * * * * *

[fol. 520] SEYMOUR GRAUBARD, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Carter:

Q. You of course are a member of the Bar of the State of New York?

A. Yes.

Q. And a member of the Bar of this Court, are you not?

A. Yes, sir.

Q. Are you the Seymour Graubard who represented the objectant Rosen in the derivative litigation that we have been discussing in this trial?

A. I am.

* * * * * * *

[fol. 521] Q. Did you make efforts to obtain the appearance of Mr. Kirby before Referee Fitzsimmons?

A. Yes, sir.

Q. Will you characterize the efforts that you made as diligent?

A. I believe they were, sir.

Q. Did you attempt to serve them with subpoenas?

A. We did.

Q. Were you successful?

A. No, sir.

Q. Who then was representing Mr. Kirby?

A. Mr. Daly and Mr. Adams spoke jointly, it seemed to me, in regard to Mr. Kirby's appearance or non-appearance. At one time Mr. Daly, as I recall, made some state-

ment to the effect that he would speak for Mr. Kirby in that regard.

[fol. 522] Q. Did you attempt to enlist Mr. Daly's co-operation to secure the appearance of Mr. Kirby before Referee Fitzsimmons?

A. I sought to gain an order of the referee for that purpose.

Q. Did Mr. Daly ever tell you in substance that they would not produce Mr. Kirby?

A. No, sir. Mr. Daly opposed my efforts, in which he was joined in his position by Mr. Adams and I recall Mr. Pomerantz.

Q. Were the merits of the 1949-'50 IDS transaction in issue before Referee Fitzsimmons?

A. They were, sir.

Q. Did you as an attorney representing the objectant Rosen feel that Mr. Kirby had a fiduciary duty to the stockholders of Alleghany Corporation?

The Court: Objection sustained.

Q. So we can hurry along, Mr. Graubard, did a doctor testify before Referee Fitzsimmons on Mr. Kirby's behalf as to his physical condition?

A. Yes, sir.

Q. Did you retain the services of an eminent cardiologist to testify before Referee Fitzsimmons and give his opinion as to whether or not based upon what he heard Mr. Kirby's [fol. 523] doctor opine as to whether or not Mr. Kirby was sufficiently able and healthy to appear?

A. Yes.

Mr. Whittlesey: I question the relevancy of this.

The Court: So do I.

Q. Do you recall, Mr. Graubard, that the referee and Special Master Fitzsimmons came down with his report in November, 1958?

A. Yes, sir.

Q. Did you familiarize yourself with the content of that report?

A. I did.

Q. Was there a motion made in this court to confirm that report?

A. As special master, there was.

Q. Did you oppose that motion?

A. Technically, Mr. Brussel opposed it, but I assisted him in his opposition.

Q. Did you make an offer of proof?

A. Yes, sir. Meaning, Mr. Brussel did.

Q. Did you consider you and Mr. Brussel were acting jointly in that connection?

[fol. 524] A. I was assisting him with the knowledge that I had of the facts in Zenn v. Anzalone elicited during the hearings before Referee Fitzsimmons.

Q. Of course, I take it, you have a recollection of Judge Dimock's decision of September 22, 1959, do you not?

A. Yes, sir.

Q. Did you have a discussion about that with Randolph Phillips?

A. Yes, sir.

Q. Did you and he feel that Judge Dimock's decision was a major victory for the cause that you were representing?

Mr. Whittlesey: I don't see that that is relevant.

The Court: I will allow it, it is preliminary.

A. Yes, sir.

Q. Did you at that time envision more hearings before Referee Fitzsimmons or Special Master Fitzsimmons, as the case might be?

A. Yes, sir.

Q. Did you think that Judge Dimock's decision at least opened the door to you for an opportunity to produce addi-

[fol. 525] tional evidence?

A. Yes, sir.

Mr. Whittlesey: What they thought about the Dimock decision has nothing to do with the issues before you?

The Court: It is preliminary.

[fol. 526] Q. Now, at or about that time, Mr. Graubard, did you have a conversation with Mr. Phillips with respect

to what effect, if any, the Judge Dimock decision would have on the chances of compromising the litigation?

A. There were many such conversations with Mr. Brussel and Mr. Phillips, both.

Q. Did you feel that the Judge Dimock decision enhanced the possibility of this settlement?

A. It enhanced the possibility of the settlement along the lines that we preferred to have it settled.

Q. Now, did you have plans at that time if the hearings reopened to call Mr. Kirby as a witness?

A. Yes, sir.

Q. Did you discuss those with Mr. Phillips?

A. I am certain he was present at discussions that I had with Mr. Brussel along that line.

Q. Did Mr. Phillips say to you, in words or substance, that he did not feel that Mr. Kirby was knowledgeable with respect to the facts underlying the causes of action alleged in Zenn and Breswick?

A. You mean all the causes of action? I don't recall that.

Q. Well, let's take Count 1 in Zenn.

[fol. 527] A. We had preliminarily agreed that we would not be able to produce the evidence before Special Master Fitzsimmons in regard to Count 1. In fact, I had prepared a memorandum as to what I thought we could put in by way of evidence before the Special Master at this new hearing. We did not include Count 1. At best we thought we would take Count 1 into consideration for some evaluation in determining whether or not the settlement offers received to date had been reasonable.

Q. Now, let me ask you this: As of that time was it your plan if the hearings reopened before the referee or the special master to call Mr. Kirby as a witness, if you could?

A. Yes, sir.

Q. Was Mr. Phillips, so far as you know, familiar with that plan?

A. Yes, sir.

Q. Now, when for the first time, Mr. Graubard, did you learn that Mr. Phillips was exploring settlement possibilities with Mr. Ireland?

A. I could not give you the precise date, but I know that he was friendly with Mr. Ireland. He had told me from time to time of discussions that he had with Mr. Ireland as well as Mr. Wallace and also others. I could not at this [fol. 528] time tell you when one began and the other left off.

Q. I would not expect you to pinpoint it, sir, but in any event can we agree that it was some time after the Dimock decision?

A. Yes, sir.

Q. Now, at that time had you ever met Mr. Ireland?

A. I had met him once when I subpoenaed him as a witness before the referee in Zenn v. Anzalone.

Q. And was that, up to that point, your entire exposure to Mr. Ireland, the only time you met him?

A. I believe that was my entire acquaintanceship with him.

Q. So far as you know had Mr. Brussel ever met Mr. Ireland?

A. Not that I know of, but he might have.

Q. Now, are we agreed that in the fall, after Judge Dimock's decision, to your knowledge, that Mr. Phillips carried on these settlement discussions, negotiations with Mr. Ireland?

A. Yes, sir.

Q. Now, from time to time did Mr. Phillips make reports to you concerning the progress of those negotiations?

[fol. 529] A. Yes, sir.

Q. And were those reports oral, written or a combination of both?

A. They were oral reports and they generally would be given on the day that the conversation took place, quite frequently between 11 and 12 at night on the telephone.

* * * * * * *

[fol. 530] Q. You mentioned in that connection in addition to the $900,000 offer a $450,000 offer. Were you referring to the ten-year employment contract at $45,000 a year?

A. I thought that is what you were referring to, sir.

Q. Was it your understanding that that offer was made by Mr. Ireland on Mr. Kirby's behalf to Mr. Phillips personally, and that the $450,000 would go to him?

A. No, sir. I testified before that it was my understanding that the offer came from three parties, Kirby, the estate of Young and the Murchisons, and that this was to cover certain personal services. In the discussion that I [fol. 531] had with Mr. Phillips which ensued, we tried to put this into its proper place, what was intended. There was one thought that conceivably this may have been meant honorably to call for his services, since he is a man of talent. There was also some thought on our part that this was meant to reduce our bargaining powers and our objectives. In any event, the offer had been rejected and what we had to do was now to build it up, to add it to the offer for the benefit of the corporation.

The Court: How could you do that when this was an offer to Phillips personally for services to be performed by him, how could you make it for the benefit of the corporation?

The Witness: What we did, sir, was to say—we sent Mr. Phillips back and it was actually Mr. Phillips' idea how this would be done, we sent Mr. Phillips back to translate these ten-year payments into a lump sum, that would be on a discount basis, and add that amount to the offer already made, with nothing to go to Mr. Phillips but all of it going to the corporation. That was precisely what we did do, sir.

Q. Mr. Graubard, did you ever learn whether or not the Murchisons [illegible] approved that $450,000 offer, as you [fol. 532] characterize it?

A. Yes, sir.

Q. What did you learn?

A. I learned subsequent to the event in a memorandum that I was shown, I think prepared by Mr. Adams, that this offer had been intended for Mr. Phillips; that it had been rejected and apparently it had been discussed prior to its being made.

Q. Do you have any personal knowledge of the fact that the Murchisons had knowledge of the fact that Ireland was going to make this offer to Mr. Phillips?

A. None other than that which I have just testified to.

Q. Would your answer be the same if I asked you with respect to the other principal defendant, the Young estate?

A. Only hearsay, sir, but I do know—I have been told that Mr. Daly testified that this offer was made with his approval.

* * * * * * *

[fol. 533] Q. Yes, right. By the way, when you met Mr. Ireland some time after the event, did you discuss with him this $450,000 offer?

A. Never did, sir.

Q. Did you ever make a disclosure of that $450,000 offer to Mr. Teitlebaum or Mr. Newton?

A. Never did, sir.

Q. Did you ever make disclosure of that offer to Judge Dimock?

A. There was no point in doing it, sir. It was not before the court.

Q. I understand it was not before the court, but I was interested in finding out whether or not you informed the court that during the negotiations between Ireland and Phillips that such an offer had been made?

A. Mr. Carter, in the sense that that offer had already been translated into an additional amount of settlement, this was before the court and this was the only thing properly before the court.

The Court: As I understand it, Mr. Graubard, the offer, so far as it was a payment to Phillips individually, was re-

jected out of hand, and you used that as a basis for further negotiations to increase the offer to the corporation. When [fol. 534] that was done, that offer was put before the court.

The Witness: That is precisely correct, sir.

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Mr. Carter: I think Mr. Updike will have some ques-[fol. 536] tions, your Honor.

The Court: Any cross-examination?

Mr. Carter: I think Mr. Updike wil lhave some ques-[fol. 534] tions, your Honor.

The Court: All right.

By Mr. Updike:

Q. Mr. Graubard, it has already been established that you appeared on behalf of objectant Rosen in the hearings before Referee Fitzsimmons. In terms of approximate duration about how long did those hearings take, sir?

A. About four months, perhaps a little longer.

Q. And Mr. Pomerantz appeared at those hearings as general counsel for the plaintiffs, did he?

A. Yes, sir.

Q. Did his partner, a Mr. Haudek, appear from time to time on those hearings?

A. He did.

Q. Now, I show you Plaintiff's Exhibit 357 for identification, which purports to be a copy of a demand for documents on the letterhead of David Berdon & Company, served by Mr. Pomerantz on the defendants' counsel, which was marked Plaintiff's Exhibit 461 in the Zenn hearings, and ask you if you can recognize it, sir?

• • • • • • • •

[fol. 537] A. I don't recall—

Mr. Updike: We have stated on the record that Mr. Phillips is not involved in this hearing.

A. I don't recall the document, Mr. Updike, but I see it is marked as an exhibit dated January 12, 1956, in the Zenn v. Anzalone hearings.

Q. Very good, sir. Now, if I may, I direct your attention to so much of page 7 of this exhibit as appears under the number 35, and ask you if you recall that?

* * * * * * *

[fol. 538] A. I have read this, sir.

Q. Does that refresh your recollection, Mr. Graubard, that one of the groups of documents that the plaintiffs and your client as objectant was seeking to adduce before the referee was projections and forecasts with respect to the affairs of IDS?

Mr. Phillips: Same objection, your Honor.

The Court: Why don't you ask Mr. Graubard whether he was seeking that?

Mr. Updike: That is my next question, sir.

The Court: Ask that first. Here you have a witness on the stand. Ask him if he asked for that.

Mr. Kissam: If your Honor please, may I make this suggestion? I appreciate that this area is within the amended complaint, but I gathered from something that your Honor said either yesterday or today, at least I got the impression that until this case got in the posture where there was some evidence that there was a corrupt bargain, perhaps it might be necessary to take all of the time [fol. 539] to get into this involved—

The Court: My analysis of the case from the pre-trial briefs and the admissions is that unless the corrupt bargain is established then the release which was given to Mr. Kirby and the settlement would bar any litigation which involves Zenn v. Anzalone, and the 1950 stock transaction was involved in Zenn v. Anzalone. I just simply throw that out so you won't go through a lot of waste of time. It seems to me, Mr. Updike, if you and Mr. Carter can establish the corrupt bargain, so-called, to set aside the settle-

ment, then you can open up a lot of things, but until you do you are bound by the settlement.

Mr. Updike: Well, first of all, we would like, if we could, your Honor, to brief that problem to you.

As we view this, the corrupt bargain theory of the complaint is one form of fraud perpetrated here that this court has the power and the jurisdiction to set aside.

The Court: That's correct. You do not need to brief that point for me. I realize that.

Mr. Updike: The other is that in a set of circumstances where the duty was on Mr. Kirby as a fiduciary to come forward and justify the fairness of the transaction be- [fol. 540] tween him and his corporation, if we can establish that to the knowledge of Alleghany and to the knowledge of Mr. Kirby that documents clearly relevant, clearly material to an evaluation of his liability, in spite of the efforts of this witness on this witness stand to get at those documents, in spite of his requests, that they were never produced, I submit that that is also a separate ground—

The Court: That might be a basis for intervening in the State Court action in trying to offset the settlement in the State Court action on the ground of newly discovered evidence or something like that, but it is no basis in this court at all. It seems to me you are saying that Mr. Kirby did not produce some documents that were necessary before the referee in the State Court. Now, that has got nothing to do with any issue before us. If there was a settlement in the State Court and a release given to Mr. Kirby in the State Court, that is binding, so far as we are concerned, until you set aside the settlement in the State Court.

Now, we cannot set aside the settlement in the State Court on some theory that they should have had more evidence in the State Court.

Mr. Updike: Well, as we view it, sir, it was just as much [fol. 541] a duty to state before Judge Dimock with respect to the hearings before Referee Fitzsimmons material that bore on the fairness of this transaction as between Mr.

Kirby and his corporation as there was with respect to the so-called corrupt bargain.

The Court: Well, that is something comprehended in the hearing before Judge Dimock. If he did not produce it there, any minority stockholder or the corporation could have objected. They could have taken an appeal there. But now you are trying to open up a settlement and a general release on the basis that something was done wrong in that hearing. Now, there must be some finality to litigation. You cannot do that here.

Mr. Updike: These documents were within Mr. Kirby's control. He was the president of this corporation all during this period, sir.

The Court: Even so, did the referee ask for them?

Mr. Updike: The referee asked for them. This witness asked for them.

The Court: And didn't get them; Mr. Kirby did not get them?

Mr. Updike: He did not get them. Beg pardon?

[fol. 542] The Court: And your client, Alleghany Corporation, stood by and let that go through without the documents being produced?

Mr. Updike: Mr. Kirby was the executive officer in charge, along with Mr. Young.

Mr. McDonald: That is not true, and you know it, Mr. Updike.

The Court: Anybody could have objected at that hearing if the documents were not being produced, but if the people let a hearing go through and the documents are not produced, why, you cannot upset it now by saying there should have been other evidence. Every trial we have in this court could be opened up on that basis, that somebody should have brought in some other evidence. There has got to be some finality to litigation.

Mr. Updike: Even when there is a demand on the record by a lawyer admitted to the bar?

The Court: Even if there is a demand on the record. That is something that is closed with that record. Now, it seems to me you are just wasting a lot of time in going into this until you can upset that settlement. If you upset the settlement on the basis of a corrupt bargain, then, of course, you can go in to any of those factors, but until you do, why, the settlement is a binding settlement.

[fol. 543] Mr. Updike: When we had our pre-trial, your Honor, I understood you to say instead of calling witnesses back a second time you were going to allow a brief, foreshortened version, and I can be through with this witness in 20 minutes, sir, 25 minutes.

The Court: Well, all I am saying is that you may be wasting that 20 or 25 minutes. That is what I am saying to you. Unless you can set aside the settlement, why, it does not make very much difference.

Now, I am not going to cut you off on anything that you think is relevant. You can make your record, if you want to. But I am just warning you that I cannot see that it gets you very far.

Mr. Kissam: Your Honor, couldn't he make an offer of proof, because Mr. Updike says 20 minutes, and assuming he is quite accurate, that 20 minutes may step off by way of cross-examination a considerable length of time.

The Court: Well, all I am saying to defense counsel, too, they shouldn't waste their time. I am saying to all counsel not to waste any time. You have got one issue. We have had two days in this trial and you haven't even met that principal issue yet, and I am frankly getting a little dis-
[fol. 544] couraged that you are ever going to meet it. It seems to me you go off on a lot of by-paths. Certainly Mr. Carter's examination did not meet the principal issue in the case.

Now, if you want to know whether there was a demand for those documents before the referee, I take it that if the document says there was a demand, there was a demand. I will let you ask that question.

The Witness: Shall I answer the question as you phrased it, Judge?

The Court: Yes.

The Witness: As you put it, your Honor, I did make a demand for such documents. To put the other half of the question, this subpoena, which I have before me, in paragraph 35, purports to demand the documents but within my own experience Mr. Pomerantz did not produce such evidence nor make use of such evidence during the course of the proceedings.

The Court: Were the documents available for him in response to the subpoena?

The Witness: Mr. Pomerantz testified that he had all documents available to him.

The Court: Which had been subpoenaed.

The Witness: Yes, sir.

[fol. 545] The Court: And Mr. Pomerantz represented the minority stockholders who were the plaintiff in the case.

The Witness: He was general counsel for the plaintiff, sir.

Mr. Updike: I believe the record will show that it was stated that Mr. Graubard had been given access to all of the documents that Mr. Pomerantz had.

The Court: Well, let us ask the witness.

By Mr. Updike:

Q. May I draw the witness' attention to pages 1943, 44 and 45—

The Court: Of what?

Mr. Updike: 1943, 44 and 45 of the Zenn hearings before the Referee.

The Court: What is your question?

Mr. Kissam: May we have a minute to get that?

Mr. McDonald: We never get notice until the document is handed. Let us have time to find it.

The Court: All right, you can be looking at it. Let us hear the question. There is no question.

Q. Mr. Graubard, would you read those pages, please, sir, and using them to refresh your recollection state whether you specifically adopted requests of Mr. Haudek [fol. 546] with respect to the production of projections and forecasts with respect to IDS for the years '49 and '50?

A. Yes, Mr. Haudek stated that he did make such requests.

Q. And did you, at page 1944, receive the reply from Mr. Wallace that "There are no such documents in Alleghany's files"—

A. Yes, sir.

Q. —unless we find those various reports that we are looking for."

A. Yes, sir.

Q. Now, without going into each one in detail, Mr. Graubard, you made perhaps a dozen requests for documents, did you not, sir?

A. That's right, sir.

Q. I draw your attention to page 2730, 31 and 32—perhaps it is in a different volume.

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[fol. 547] A. I have read this, Mr. Updike.

Q. Now, did you not, sir, complain that you have been seeking for some six weeks to get these documents?

A. They are not quite the same documents that were referred to earlier.

Q. Well, may we have your recollection as to which documents these were?

A. Certain other documents which I had requested of IDS or documents that were in the possession of Alleghany concerning IDS. In particular, on page 2725 I had stated, I wanted particular documents relating to the 1949, 1950 business activities of IDS. Mr. Haudek's request covered [fol. 548] years subsequent to 1950, as well as years prior to 1950.

Q. But his request did cover both '49 and '50, did it not?

A. That's right, sir.

Q. Now, when you stated that you had been trying to get these documents for six weeks and you still did not have them, was that the fact at that time, sir?

A. That's right, sir.

Q. I draw your attention to your statement at the bottom of page 2731 and the top of 2732, where you say, "In the future I will no longer ask for any further papers bearing in mind that the burden of proof is on these defendants." Do you remember making that statement, sir?

A. Yes, sir.

Q. Is it the fact, however, that despite that statement you did persist in asking for documents and reports concerning IDS?

A. I am afraid it is, sir.

Q. Now I draw your attention, sir, particularly to—does your volume, sir, contain 3060?

A. No, sir.

I have it here, sir.

[fol. 549] Q. At page 3060 there was produced for you some documents that were marked Defendants' Exhibit 396 and 397, am I right about that?

A. That's right, sir.

Q. I show you copy of what was marked Plaintiff's Exhibit 397-B and 397-C and ask you if you can recognize them?

A. I believe I have seen these before.

[fol. 550] Q. In looking at the first page of 397(b), which is the report of operations for November 30, 1949—am I correct in that?

A. Yes.

Q. The aggregate of the assets is shown to be $291,841,717.

A. Yes, sir.

Q. There is a comparison with December of 1948, where it was $283,631,000.

A. That's correct.

Q. I now show you, sir, Plaintiff's Exhibit 238 for identification, which has been produced from the files of IDS,

and I draw your attention particularly to Exhibit B attached to this exhibit and to the column at the left-hand side, where under the month of November it says, "Projected 1949," and again in the comparative column with respect to the period of 11 months ending November 30, the column which says "Projected 1949."

I ask you if there was ever produced in the course of the hearings before Referee Fitzsimmons that projection or any such projection?

A. I could not now tell you, sir, the record will speak for itself. I just don't recall. We did introduce several [fol. 551] hundred documents, but I cannot tell you whether or not this information was covered.

Q. I represent to you, sir, that no identified exhibit contains that information and my question now is whether any such document was exhibited to you and not introduced?

Mr. Whittlesey: If your Honor please, Mr. Updike has now produced something from the files of IDS, not Alleghany. It seems to me that we are rapidly getting into the one area which your Honor has stated we will not get into, and that is a retrial of the Zenn case on the merits. If we keep on at this rate we will have documents and documents and documents.

The Court: We are not going to keep on at this rate. He has asked if that document was produced and Mr. Graubard says he doesn't know.

Mr. Whittlesey: We went out to Minneapolis for something like four days because they did not have this stuff in the Alleghany files, and we have about a thousand documents from IDS.

The Court: We are not going through all of that.

[fol. 552] Q. My question was whether any such projection was exhibited to you?

A. During the course of the colloquy, Mr. Updike, I have had the opportunity to compare the two exhibits, and I find that by a fast scrutiny they are really not comparable. I

don't know whether I have actually seen information such as is set forth on this second exhibit, which you have shown me, 238 for identification. I just could not tell you at this time.

Q. Do you have any recollection now that any projections or forecasts were furnished to you in connection with those hearings?

A. Yes, sir. I believe that the record will show that there were forecasts, that my briefs to the referee and to Judge McGivern lay stress upon these forecasts, and I have a particular recollection indeed of mention of these forecasts in correspondence between Mr. Purcell and Mr. Young.

The Court: Let me ask you this, Mr. Graubard, you were representing an objecting stockholder?

The Witness: Yes.

The Court: Did you feel that the information you had received was sufficient for your needs or did you feel [fol. 553] it was not?

The Witness: Your Honor, I felt that I had made a substantial case with the information supplied to me. I felt I had proved my case. The Court decided otherwise.

The Court: Did you feel you were being prevented from getting material that you really felt you were entitled to receive?

The Witness: During the course of the hearing, your Honor, I asked Mr. Adams, who represented the Murchisons, who was then in control of IDS, specifically for the information of the type that Mr. Updike now refers to, and the Court refers to, and the Court refused to go along with my request to Mr. Adams to produce this information. I might add that the transcript clearly shows that possession of these documents was in the hands of the Murchisons rather than in the hands of Alleghany.

In fact, mention was made at that time that IDS was controlled not by Alleghany but by the Murchisons.

Q. We will refer to the Record for that position, Mr. Graubard, but I ask you to examine, if you will, Plaintiff's

Exhibit 348 for identification, which is the summary of [fol. 554] operations report at December 31, 1949, and ask you if you ever saw projections in that form, covering a 12-month period?

Mr. McDonald: This record is going to be a complete mishmash. At your request, we filed and gave exhibit numbers for this trial to certain documents. Now Mr. Updike is using exhibit numbers which were put on in the Zenn hearing without any identification that it is a Zenn exhibit number.

The Court: Is this an exhibit number for this case?

Mr. Updike: This is an exhibit number for this case that I have just read.

Mr. McDonald: Then I am sorry, I am in error and I apologize.

The Court: It won't be as much as a mishmash as you thought.

Mr. McDonald: No.

A. I do not recall whether I saw a document precisely like this or resembling it.

Mr. Updike: That document was produced from the files of the defendant Kirby, your Honor.

Q. The projections, Mr. Graubard, to which you referred a moment or so ago in response to my question were [fol. 555] projections contained in a letter by Mr. Purcell addressed to Mr. Young and Mr. Kirby, is that right?

A. I do recall there was a letter addressed by Mr. Purcell to Mr. Young. Whether Mr. Kirby was included, I don't recall. In fact, I have a fairly clear recollection that most of the correspondence between Purcell and Young was between them directly and that Mr. Kirby got information largely by communicating with Mr. Young. Now, that is my recollection, sir, and I have not looked at the transcripts for a number of years.

Q. At any rate, you do not now recall whether you saw any projections in the form as exhibited to you and as is before you now?

A. I do not now recall.

Q. I now show you, sir, Exhibit 37-J—

The Court: What is this?

Mr. Updike: I am going to get the other identification, Judge.

This is Plaintiff's Exhibit 246 for identification.

Q. I ask you if you ever saw projections covering an entire year in that form before?

A. Mr. Updike, in stating that I do not now recall, I [fol. 556] think in the interest of justice I better be accurate. We had made available to us, and by "We" I mean my firm, there were several of us working on these files, we had available to us some thousands of documents and we were given but a limited time to go through these documents in order to keep up with the proceedings before the referee. Whether or not any of these documents or their like were examined by any of the persons on our team at that time, and then not made use of, either intentionally or through error, I cannot now tell you.

Q. I direct your attention, sir, to the fact that from its caption this is the projected, condensed net income statement for IDS for the year 1950 by months, and it bears the date of April 14th in the lower right-hand corner. Do you see that, sir?

A. Yes.

Q. If you turn to the second page, it projects a net income for the year 1950 of $7,140,000 for IDS. Recalling that there were some 249,000 shares outstanding, do you still say that you might have seen this and overlooked it?

[fol. 557] A. My recollection is that we did deal with the fact that the earnings for 1950 exceeded the purchase price of the stock earlier that year. Further, that the projections, as I recall them, did exceed the sales price of the stock in 1950. The probabilities are that I did not see anything which would indicate that the earnings would be so many times the sale of the stock. If I had, I would have introduced it in evidence, had I known.

Q. In other words, you would have regarded that document as highly material to the issue before the referee, am I correct?

Mr. Whittlesey: I object to that.

The Court: Overruled. That is implicit in Mr. Graubard's statement.

* * * * * * *

[fol. 558] Q. Mr. Graubard, I now show you Plaintiff's Exhibit 245 for identification, also from the files of IDS, [fol. 559] which purport to be projections for a period 1950 and for four years beyond 1950, and I ask you if you ever saw that before?

The Court: Did you ask him these questions on his deposition?

Mr. Updike: No, sir, we did not have this specific information available at that time.

A. I do not recall seeing these before.

Mr. Updike: That is all.

* * * * * * *

[fol. 560] Cross examination.

By Mr. McDonald:

Q. Mr. Graubard, I hand you a document which has been marked in this case as Plaintiff's Exhibit 1 and ask you if you recognize that as a printed copy of the consolidated and amended complaint in the Zenn v. Anzalone action?

A. I do.

Q. When you were retained as attorney, this was the then vital pleading in this action?

A. Yes.

* * * * * * *

[fol. 561] By Mr. McDonald:

Q. You are also familiar with the stipulation of settlement?

A. Yes.

Mr. McDonald: That has been marked as Defendant Kirby Exhibit 135 and will be offered within your Honor's ruling.

Q. You were familiar with the fact that the stipulation as tendered was a $700,000 single cash amount plus the amendment of certain contractual guarantees in settlement of all eight causes of action, were you not?

A. That's right.

Q. And that it was not allocated as between one or the other of the eight causes of action?

A. That's correct.

Q. You were also aware, of course, that the Murchisons [fol. 562] were parties to quite a number of causes of action?

A. That's correct.

Q. As of September 20th, which is about the time the master's hearing started, you had reached the conclusion that the settlement in your opinion was inadequate, had you not?

A. That's right.

Q. That was based upon general knowledge and upon information from Mr. Phillips?

A. It was based largely upon information from Mr. Phillips and Mr. Brussel.

Q. And that the information from Mr. Brussel and Mr. Phillips related only to the causes of action other than the first cause of action?

A. They had no information about the first cause of action.

Q. So that as of that moment, when the hearing started, your preliminary judgment that the settlement was inadequate was resting upon those causes of action other than the first one?

A. That's right.

Q. Who were the active parties in the hearings before the referee?

[fol. 563] A. The active parties were the Murchisons, Mr. Robert Young, Alleghany Corporation was nominally represented by counsel who was not very active, and the plaintiffs through their general counsel, Mr. Pomerantz and certain of the objectants.

Q. There were a large number of defendants other than the ones you have named, were there not?

A. That's right.

Q. And one of those defendants whom you have not named was Mr. Allan P. Kirby?

A. He was never served and therefore was never a party to the litigation, although he was a proponent of the settlement under the terminology that we have used.

Q. From the beginning, is it a fact, Mr. Graubard, that both Mr. Adams and Mr. Daly as members of the bar asserted their solemn conviction that the causes of action were without merit?

A. They asserted that conviction, whether or not they did so as members of the bar I don't know.

Q. And Mr. Daly even testified to that under oath, did he not?

A. That's right.

Q. From the standpoint of the other counsel who was there proposing the settlement—Mr. Pomerantz?

[fol. 564] A. That's right.

Q. Mr. Pomerantz from the beginning represented that in his judgment the settlement was fair and reasonable, did he not?

A. That's correct.

Q. The issue of Mr. Kirby's appearance and the issue of his health was posed before the referee, was it not?

A. Repeatedly and strenuously.

Q. There were two physicians who testified?

A. That's right.

Q. One was a physician who had examined and was in attendance on Mr. Kirby, was he not?

A. That's correct.

Q. And the other was the physician who listened to the first doctor's testimony and gave his opinion based on that?

A. That's correct.

Q. And the referee passed on that issue?

A. That's right.

Q. When the matter got before Judge McGivern, was the question of Mr. Kirby's non-appearance raised in your brief?

A. Very strenuously and at length.

[fol. 565] Q. And it was urged on Judge McGivern?

A. That's right.

* * * * * * *

[fol. 566] Q. Mr. Brussel, however, did, in due course, file objections in the court here to the master's report?

A. That's right, sir.

Q. Do you remember the general content of those objections?

A. Yes, sir.

Q. Do you recall that one of them included an offer of proof?

A. That's right, sir.

Q. Did any of that offer of proof relate to the so-called 1950 cause of action in the Zenn case?

A. None of it, sir. I believe I prepared a memorandum for Mr. Brussel in regard to the proceedings before the master and it did not include any of the allegations or facts concerning the first cause of action in Zenn v. Anzalone. That was due to the fact that that cause of action was not pleaded in Breswick v. Briggs in this court.

Q. Now, in the State Court you have mentioned that you filed a memorandum in opposition to the report of the referee recommending approval of the settlement.

[fol. 567] A. Yes, sir.

Mr. McDonald: This is the one exception, your Honor, I would like to our general rule about introducing documents. I would like to have him confirm this was a mem-

orandum and offer it in evidence. It will only take a second.

The Court: Well, have him identify it, anyway. We will see if we need it in evidence after.

Mr. McDonald: All right.

Q. I show you a document which has been marked Defendant Kirby's Exhibit 41 for identification in this proceeding and ask you if that is a copy of the memorandum to which you refer.

A. Yes, sir.

Q. Is this the memorandum, Mr. Graubard, which contained as an appendix B a mathematical calculation of alleged liability predicated upon an assumption that the plaintiff would win all counts on all points?

A. Yes, sir. It had been fixed not entirely on a maximum. There were certain allowances made for losing some points; yes, sir.

Q. Were the points on which there was an assumption [fol. 568] of loss significant points in terms of amount?

A. No, sir.

Q. So that basically it was a mathematical calculation of the alleged liability on all of the principal claims, assuming a complete success for the plaintiffs?

A. Not entirely, sir. We discounted certain of the claims completely because we had not proven the charges contained in the complaint.

Q. To save the Court's time, is the fact of that discount shown in the document?

A. Yes, sir.

Mr. McDonald: Then I offer it in evidence.

The Court: Was this filed in Breswick v. Briggs?

The Witness: Yes, sir.

Mr. McDonald: No.

The Witness: I beg your pardon. It was filed in Zenn v. Anzalone in the State Court.

The Court: And did it include a value for the 1950 exchange transaction?

The Witness: Yes, sir.

The Court: And what value did you put on that?

The Witness: It was done in the alternative, sir. As-
[fol. 569] suming a complete recision of the 1950 IDS exchange of stock for Alleghany stock, there would be a net recovery to Alleghany of 47,183,455 dollars.

Assuming, however, that certain shares sold by Mr. Young in 1953 would be eliminated, the calculation showed a net recovery to Alleghany of 39,056,838.

Assuming, in the third place, that certain additional shares should be eliminated, based upon the theory of general counsel Pomerantz, then the net recovery to Alleghany would have been 27,289,937 dollars.

The Court: Why do you need this in evidence, Mr. McDonald?

Why do you need the whole document in evidence?

Mr. McDonald: I need it in evidence, your Honor, because we are satisfied that this is the source which Mr. Daly used in the mathematical calculations he made in the letter of October 22, 1959, which is in evidence, and which does not appraise liability but merely states maximum claims.

The Court: Well, you have got the fact of what is said in this. I do not know why I have to read this long in-
[fol. 570] volved document.

Mr. McDonald: May I have one other question and perhaps that will do it?

Q. Did you also consider, either in this calculation or elsewhere, the additional alternative to which Referee Fitzsimmons gave some weight, that not recision, but damages might be awarded, at most, on the first count?

A. We did not include that in this arithmetical calculation.

Q. Do you recall what that amount was? Let me state the assumption:

Do you recall the amount of the claim on the first count on the assumption that the plaintiffs won on the count but only won damages?

A. I do not, sir.

* * * * * * *

[fol. 571] Mr. McDonald: Mr. Whittlesey has one or two questions, your Honor.

The Court: All right.

By Mr. Whittlesey:

Q. Mr. Graubard, you recall, do you not, that in the hearings before Referee Fitzsimmons or during the course of [fol. 572] those hearings a subpoena was issued to Alleghany Corporation by Mr. Kahn who represented one of the objectants, and that that called for records in Alleghany's possession relating to IDS?

A. Yes, sir.

Q. Do you recall that that subpoena was responded to and that considerable files were produced in response to that subpoena?

A. My recollection is more along the lines of the fact that while he did have a subpoena served, we had production of files on the basis of my request made to the referee and the referee's direction to the defendants.

Q. In other words, files were produced both in response to that subpoena and in response to your own requests made before the referee, isn't that right?

A. That's right.

Q. Do you recall that the amount of files so produced from Alleghany Corporation was upwards of 28 in number?

A. By a file, are you referring to a manila envelope?

Q. I am referring to folders, yes.

A. I would say there were more than that.

[fol. 573] Q. After those files were produced, is it not a fact that you and other attorneys representing the objectants examined those files on numerous occasions?

A. Yes, sir.

Q. Do you recall now the number of occasions and approximately the amount of time that you spent going through those files?

A. We spent several days going through those files, and since some of those days were half days and others lasted 16 hours, I could not give you the precise number without looking at the diary entries.

Q. You do not have your diary entries available here?

A. I do, as a matter of fact.

Q. Could you check and find out the total amount of time that that shows?

The Court: Give us a rough approximation.

A. I would guess there were about four days spent in examining those files.

Q. Totaling about how many hours?

A. Four days spent by four people, so you would have to multiply the days by four, about 16 days of man hours, I would say.

Q. Those four people were whom?

[tol. 574] A. Mr. Kazon and Mr. Camhy of my office and Mr. Phillips as well as myself.

Q. In addition to you and representatives from your office, attorneys representing others of the objectants examined those files?

A. Mr. Kahn and certain of his associates also looked at these files.

Q. Mr. Graubard, after you and your associates had examined those files, were you satisfied that Alleghany Corporation had fully complied with the requests both of the subpoena and your own requests so far as material in Alleghany's files were available?

A. Based upon the kind of material I found in those files, I was satisfied that Alleghany had made a literal compliance with the subpoena without culling any papers out of the files.

Q. In other words, you were satisfied that the files had in no way been tampered with or expurgated?

A. That's right.

Q. On what did you base that belief?

A. On the basis of the documents that I found in those files.

Q. And the documents which you thereafter introduced before the referee?

[fol. 575] A. Yes, sir.

Q. Do you recall, Mr. Graubard, that you caused a subpoena duces tecum to be issued by the referee to Mr. Purcell in connection with those hearings?

A. Yes, sir, and he produced papers.

Q. I show you this photostat and ask you if that is the subpoena to which you referred?

A. Yes, sir.

Mr. Whittlesey: Your Honor, I would like to have this marked.

The Court: Show me what the relevancy is.

Mr. Whittlesey: I want to show—

The Court: Show me the relevancy.

Mr. Whittlesey: I want to mark it for identification first, your Honor. I was not aware of it until last Friday and did not see it until last Saturday. I am not offering it now.

The Court: Very well, it will be marked for identification.

(Defendant Kirby Exhibit 350 marked for identification.)

Q. Mr. Graubard, in the course of your examination of the records produced from the Alleghany files, did you become aware that IDS had various subsidiary companies, [fol. 576] one known as ISA?

A. Yes, sir.

Q. And another known as IST&G, Investors Syndicate Title & Guarantee?

A. Yes, sir.

Q. And another known as ISC, Investors Syndicate of Canada?

A. Yes, sir.

Q. Do you recall whether at the time of your examination you saw financial reports of any of those subsidiaries?

A. I did, all of them.

Q. In reading those reports, did you become acquainted with the name of George Rossiter & Company as auditors?

A. Yes, sir.

Q. And with the name of Millar, McDonald & Company as auditors for ISC?

A. That name is familiar to me because I saw some documents concerning Rossiter at my deposition. I could not now tell you whether or not concerning McDonald—I could not now tell you whether my familiarity with the name stems from my original research or from having seen the documents again recently. In regard to Rossiter, I have a [fol. 577] clear recollection.

Q. There is no question in your mind but that you did examine the financial reports of Investors Syndicate of Canada?

A. Yes, sir.

* * * * * * *

[fol. 578] By Mr. Phillips:

Q. Mr. Graubard, after the remand by Judge Dimock, pursuant to his decision of September 22, 1959, did your office prepare for the use of Mr. Brussel, yourself and myself a memorandum of the matters to be covered in the hearing before Special Master Fitzsimmons?

A. Yes.

Q. I hand you a document which is dated October 23, 1959, and has been marked for identification as Phillips Exhibit 26, and ask if that is the memorandum in question.

A. Yes, it is.

Q. Now, in addition to that memorandum, Mr. Graubard, is there attached thereto an outline of the prospective examination of the defendant Allan P. Kirby in Breswick v. Briggs?

[fol. 579] A. Yes, there is.

Q. Now, Mr. Graubard, can you tell me first, without looking at the memorandum or the prospective examination outline, whether or not any discussion is contained in those two documents which are attached together as one with respect to the 1950 cause of action?

A. I know there isn't.

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[fol. 580] Redirect examination.

By Mr. Carter:

• • • • • • •

[fol. 581] Q. At that time in 1959 the Murchison brothers had no office in Alleghany, had they?

A. I don't know.

Q. You don't know whether or not they had any stock?

A. I don't know.

Q. With Mr. Kirby then chairman of the board and president of Alleghany, won't you agree that it is a fair inference that your desire to protect the bona fides of any return of control of IDS to Alleghany was based to some extent upon your lack of confidence in Mr. Kirby?

Mr. Phillips: This is pure argument. He is arguing with the witness.

The Court: I will let him answer. I don't think he is getting anywhere.

A. Mr. Carter, I understand Mr. Kirby is in court. I have never spoken to him to this day. I don't know the man. I do know that under the leadership of Mr. Young there was what I thought was a corrupt bargain entered into between the Murchisons and Mr. Young concerning control of IDS. I was not going to let up on my efforts to make certain to the best of my ability that that corrupt bargain should not be continued in the future. I now know

on the basis of events that have occurred that that bargain [fol. 582] was personal to Mr. Young and the Murchisons, and did not include Mr. Kirby, but that is after the event.

• • • • • • •

[fol. 583] Recross examination.

By Mr. McDonald:

Q. Mr. Granbard, you have again been asked about this November 18th conversation. Looking at November 18th, Phillips Exhibit 27, do you see up here that the subject under consideration was $900,000 each for three people, totaling $2,700,000?

A. That's right.

Q. So if anything you said implies that was for a separate settlement for Mr. Kirby, it was a misunderstanding?

A. Making it very clear, the $900,000 was for each of the three, we had no firm offer at the time, and we hoped to pursue this by telling Mr. Phillips not to allow that $900,000 at least from Mr. Kirby to get away.

Q. Did Mr. Phillips tell you that Mr. Ireland explained that it was APK's idea that it be publicly announced and put before the court, this $450,000 subject?

A. I recall we discussed the publication in official records of the court, that that would be part of any kind of contract that Mr. Phillips would get, but we never went beyond [fol. 584] that because the matter had already been disposed of and rejected.

Q. This memorandum, which appears to be in Mr. Phillips' handwriting, says that Mr. Ireland explained it was APK's idea that it be publicly announced and put before the court, did he tell you that, that that had been part of the conversation?

A. It may have been, I don't recall.

• • • • • • •

[fol. 585]

EXCERPTS FROM DEPOSITION OF WILLIAM E. EPPLER

The Court: What is next, Mr. Carter?

Mr. Carter: Well, now, with your Honor's permission, we would like to start reading excerpts from the deposition of Mr. Eppler * * *

* * * * * * *

[fol. 586] "The first time he came to me with a story from the inside of the New York Central it involved a long recitation of facts as he saw them, referring—which referred to various individuals whose names I did not know, and I asked him if he would reduce his recital to writing and send it to me, and I would see that it got to Mr. Kirby's hands.

"He stated that he did not want to sign his name to a memorandum, and I said, 'Well, sign it XYZ, or any other symbol you wish, to identify the fact that it came from you.' He chose XYZ, and thus was the beginning of these XYZs."

Page 382, line 14.

"Q. As I understand the procedure with respect to the XYZs, they were to go to you from Ireland and you were to give them to Mr. Kirby, is that it?

"A. They were to come to me by arrangement with Mr. Kirby, and his explanation was, after I asked him why—"

Page 383, line 4.

[fol. 587] "A. Generally speaking, that was the practice, except with respect to several of the XYZs which were submitted immediately prior to Dave Wallace's removal, in which case Mr. Ireland took it upon himself to send those directly to Mr. Kirby, because they outlined a series of steps that Mr. Kirby might take in accomplishing his objectives.

"Q. Did you have copies of those?

"A. He sent me copies of those."

Page 392, line 2.

"Q. Mr. Eppler, I believe you said a few minutes ago that certain XYZ memos did not go to you—you did receive a copy—but were given directly by Mr. Ireland to Mr. Kirby.

"A. That is my understanding.

"Q. Who told you that?

"A. Well, I received the duplicates, and I asked Mr. Ireland what happened to the originals, because I had been getting originals. He said he had sent them directly to Mr. Kirby, or had handed them to Mr. Kirby. I am not sure which, Mr. Kissam."

* * * * * * *

[fol. 588] Mr. Meyer: Page 785, line 13.

"Q. Mr. Eppler, you have a notation in the memorandum which you recently dictated, now marked Exhibit 207, the first paragraph, which reads:

"'Dimock decision handed down September 22, 1959. Reported upon by Ireland, his XYZ 9/25/59, re his conversation with RP—frightening to APK.'

"What is the XYZ you are intending to describe by 9/25/59?"

Mr. McDonald: I object, your Honor, unless the exhibit referred to in the question is made a part of the record for all purposes.

Mr. Carter: I think that XYZ, your Honor, was received by you in evidence.

The Court: Is it in evidence?

[fol. 589] Mr. McDonald: No. I am talking—he is reading from Exhibit 207 marked on the deposition, one paragraph.

Mr. Meyer: The paragraph quoted.

Mr. McDonald: I am objecting—

The Court: Have you got that exhibit?

Mr. Meyer: I don't have 207 with me, your Honor.

Mr. Kissam: We have it. This is what we have been calling instant proof, which I shall give you.

Mr. Meyer: The objection to the question is made by the defendants on the defendants own interrogation. I am reading the transcript of the deposition.

The Court: All right, their objection is overruled.

Mr. McDonald: It was not my interrogation, Mr. Meyer.

Mr. Meyer: It was Mr. Kissam's.

The Court: Objection overruled.

Next question.

* * * * * * *

[fol. 590] Mr. Meyer: Page 3291, your Honor, line 9.

"Q. Do you know whether or not Mr. Purcell was responsible for bringing the investment in IDS to the attention of the Alleghany board of directors, initially?

"A. He told me that he was.

"Q. Have you read a memorandum that is in this record in which Mr. Robert Young states that Mr. Purcell brought this investment to their attention?

"A. I don't recall that I have any such memorandum. I have a knowledge of conversations I had with Mr. Kirby in which he took the position that the matter was brought to the attention of Alleghany by Cyrus Lewis, the senior partner of Bear, Stearns.

"Mr. Purcell stated to me that that was not so, that he brought it to the attention of Mr. Young and Mr. Kirby, that Mr. Kirby turned it down five consecutive times until finally upon spelling the possibilities for the company out in A, B, C style, Mr. Kirby finally agreed to allow the company to be acquired by the Alleghany Corporation."

* * * * * * *

[fol. 591] Mr. Meyer: Page 3893, line 13.

"Q. Mr. Eppler, what was your purpose in suggesting that Mr. Kirby go on the witness stand?

"A. Counsel for Alleghany in this litigation was Lord, Day & Lord. Mr. Daly took the position, as I recall it, [fol. 592] that he was at a point in the litigation where

the next order of business would be Mr. Kirby's appearance as a witness. I testified that Mr. Kirby looked upon his appearance as a witness with somewhat—with more or less horror, because he had been told by Ireland that Mr. Young had perjured himself in his testimony, that if Mr. Kirby undertook to support Mr. Young he would in turn perjure himself, and that Ireland, knowing what the circumstances were, would have to agree with Mr. Phillips' interpretation of Mr. Young's testimony.

"Mr. Kirby had stated time and time again that he knew nothing about the suit. He felt that if he followed my suggestion, and went on the stand, and stated that as president he was unfamiliar with the litigation, that he would be laughed out of countenance by the public and by the shareholders of Alleghany Corporation, and he was torn between two courses of action. One was Ireland's recommendation that he make some sort of a settlement by and with the assistance of Phillips, and the other one was a recommendation from me and Mr. Wallace and Mr. Tom Daly that he go on the stand, tell the truth, do the best he could, and let the chips fall where they would."

• • • • • • •

[fol. 593] Mr. McDonald: That being true, I will read only one short section.

The Court: All right.

• • • • • • • •

Mr. McDonald: Page 1724, your Honor, line 21.

"Q. Could you tell us whether you saw Mr. Carter, Mr. Don Carter, during January, February or March of 1960?

"A. Do you wish included in that board meetings of the Central? He was a director of the New York Central."

Dropping down to line 16 on the next page, your Honor.

[fol. 594] "Q. I think it would be well to keep it complete.

"A. March 9th, 'Meeting with Don Carter, 3.00 to 4.00 p.m., re Alleghany and IDS.'

"On March 10th, 'Board meeting of the New York Central, 11.00 a.m. to 3.00 p.m.'

"My diary makes no—has no entry concerning Don Carter. I am up to April 12th. You want to go through April?

"Q. That is fine."

Next page, 1726, line 14.

"Q. Do you recall what was discussed between you and Mr. Carter on March 9th?

"A. No, I don't offhand, but there is a memorandum to Mr. Kirby I believe on that subject.

"Q. That memorandum to which you refer, was a copy of that given to Townley Updike?

"A. I do not recall whether it was or not.

"Q. I note that on Exhibit 163-15"—that being the deposition exhibit number—"item No. 92 is described as 'Memorandum for the record by Eppler, re office conversation of same date with Don Carter.' Is that the memorandum you are referring to?

"Q. Do you have a copy of that here?

"A. Yes.

[fol. 595] "Mr. McDonald: May we have it marked?"

It was marked as Defendant Kirby Exhibit 156-4, and I have a copy here.

The Court: Are you offering it in evidence?

Mr. McDonald: As soon as I qualify it here.

"Q. Mr. Eppler, was this memorandum prepared at or about the time of the events set forth therein?

"A. My entry indicates that it was March 9th when he called, and my memorandum is dated March 9th, so it must have been dictated on or about that time.

"Q. Did it truly reflect the events of that conversation as you recalled them at the time you dictated it?

"A. Yes, I am quite sure of it."

I offer it in evidence, your Honor.

The Court: Any objection?

Mr. Carter: No objection.

The Court: Received in evidence.

(Defendant Kirby Exhibit 351 for identification received in evidence.)

Mr. McDonald: Page 1728, line 8.

"Q. I would like to direct your attention to paragraph 6, and the first sentence dealing with alleged reports to Dallas [fol. 596] that Ireland would recommend a fee to Phillips of $1 million.

"Did Mr. Carter indicate to you the source of such reports?

"A. He did not.

"Q. Did he state whether or not they came from any of the New York attorneys then retained by the Murchisons?

"A. He didn't indicate whether he got his information.

"Q. Did the names of either Mr. Adams or Mr. Stockhausen of the firm of Satterlee, Warfield & Stephens come into your conversation with Mr. Carter?

"A. They didn't enter the discussion at all, and I answered, if I may say, that I talked to—my response to Mr. Carter was that this was pure gossip.

"Q. That was almost the next thing I was going to ask, because I wanted to go through this paragraph.

"A. Yes.

"Q. Your response, then, was that this was pure gossip?

"A. That's right, and that Ireland's responsibility was to Alleghany, as I supposed it was, rather than to Mr. [fol. 597] Phillips.

"Q. Mr. Carter, then, I understand, reiterated that his information came from a good source?

"A. Said that his information came from a good source, and it is true.

"Q. But he didn't indicate to you at that point what the source was?

"A. That's right.

"Q. And he indicated then that if this information were true some independent stockholder would intervene?

"A. That is right.

"Q. Did he indicate who that so-called independent stockholder was?

"A. He did not.

"Q. He told you, as I understand it, that this independent stockholder, whoever it was, would ask for the appointment of a referee?

"A. Yes.

"Q. I suppose this was going to be on the fee applications, is that it?

"A. I would assume so, inasmuch as it started out on the basis of a million-dollar fee payable to Mr. Phillips.

"Q. Then Mr. Carter, as I understand it, told you that [fol. 598] this independent stockholder would call witnesses?

"A. That's right.

"Q. And those witnesses would include Mr. Eppler, Mr. Kirby, Mr. Ireland, Mr. Phillips, Mr. Teitelbaum and Mr. Newton?

"A. That's right.

"Q. And he was going to bring out, as I understand Mr. Carter's statement, if possible, if any side agreements with Phillips had been made or contemplated in connection with the final settlement?

"A. That's right.

"Q. Did you answer this rather long statement of Mr. Carter? Just yes or no.

"A. Long statement?

"Q. Did you answer this statement that Mr. Carter made about the independent stockholder, the referee—

"A. Yes, I did.

"Q. What did you say?

"A. I told him that I had no personal knowledge of any agreement that Mr. Kirby had made with Mr. Phillips, and that until I had evidence of an understanding or an agreement, if he called me to the stand, I would have to testify in all truth that I knew nothing about it.

[fol. 599] "Q. That is a little bit longer than your statement of the reply that you made in the memorandum for the record, but the substance seems to be approximately the same.

"The memorandum says that your reply was 'that so far as I was concerned, I would be glad to testify, that I knew absolutely nothing of any such situation.'

"A. In substance, that is right. I was not trying to save words, although I may have been. I think I testified here several times that I have had no positive knowledge of any agreement between Mr. Kirby and Mr. Phillips, and until I do have some knowledge, I am not in a position that I know anything about it one way or the other.

"Q. I note also in paragraph 8 that Mr. Carter expressed the then hope that no further dirty linen would be washed in public.

"Did you disagree or agree with that expression of hope?

"A. Well, I don't recall whether I agreed or disagreed. I probably disagreed, because I don't think it is ever useful to wash dirty linen in public."

[fol. 600] There is a further answer on line 17 of the same page.

"The Witness: I probably agreed with him that it was unwise to wash dirty linen in public, there should be a way of settling these things between reasonable men."

Skipping to page 1733, line 22:

"Q. Mr. Eppler, after March 9, 1960, did you at any time obtain any additional or further knowledge of the facts relating to the settlement of the Zenn and Breswick litigation other than those you had at the time of your meeting with Mr. Carter?

"A. No."

* * * * * * *

[fol. 601] ALLAN P. KIRBY, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Carter:

Q. Mr. Kirby, are you the Allan P. Kirby who is named as one of the defendants in this instant lawsuit?

A. I am.

* * * * * * *

[fol. 602] Q. And have you ever read the complaint in Zenn v. Anzalone?

A. No.

Q. In the fall of 1959 were you familiar with the nature of the claims that were being advanced in the Zenn v. Anzalone suit?

A. I would say only in a very general way.

Q. Then what I do not quite follow is if you were not familiar with the general nature of the claims being made in the Zenn-Anzalone suit, how you could have reached the conclusion that those claims were without merit, sir?

A. Well, just from conversation that had gone way back to the days of Mr. Young, that I can't even recall now, but he felt and I agreed with what he had to say, which was the fact that he regarded them as mostly holdups.

Q. And was that pretty much what your conclusion was based on, something that Mr. Young had told you?

A. That is correct, sir.

Q. And, incidentally, during the period that you and Mr. Young were associated in business, is it the fact that Mr. Young made nearly all of the major decisions, sir?

[fol. 603] A. He was the chief executive officer. He made all of the—he and I would pretty much set policy, and he would carry out the policy we set, keeping me advised in a general way, but did many, many things without my knowing anything about them. But I had a great deal of confidence in his ability and so, having made an arrangement with him at the time that we got into Alleghany, why, it was entirely agreeable to me to operate in that way.

Q. Mr. Kirby, I suppose if I asked you if you had ever discussed with Mr. Young Count 1 or what we call Count 1 in Zenn-Anzalone, I am reasonably sure I would not be getting my thought across to you, but let me put it this way to you, sir: Were you ever told that the plaintiffs in the Zenn-Anzalone lawsuit were seeking to rescind a transaction by which you and Mr. Young, in 1950, had acquired a substantial block of IDS stock in exchange for Alleghany preferred?

A. Yes, sir.

Q. Had you ever had occasion to discuss that phase of the Zenn-Anzalone suit with Mr. Young?

A. Well, I don't think we ever discussed it very much. [fol. 604] Q. All right. Now, do you know, or can you tell us when the Zenn-Anzalone lawsuit was instituted?

A. I think that it was in 1955.

Q. Along that same line, do you know the name or can you identify for us by names any other lawsuits that may have been instituted in and around that period, naming you as a defendant?

A. No, sir.

Q. When the Zenn-Anzalone lawsuit was instituted, as you say, in 1955, did you retain an attorney to represent you?

A. Mr. Young handled all such details.

Q. Well, in 1955 you knew you were a defendant in derivative actions, did you not?

A. I did. I did.

Q. Did you select the counsel to defend you or did Mr. Young select the counsel?

A. As I recall now it was Mr. Young.

Q. Well, now, did you know in 1955 the identity of the counsel who was selected by Mr. Young to represent you, Allan P. Kirby?

A. I think it was White & Case, although I am not absolutely positive of that.

Q. Well, now, did you ever discuss with anybody in [fol. 605] White & Case the merits of the claims advanced in Zenn-Anzalone?

A. I do not recall it.

Q. Did you ever confer with White & Case in connection with the preparation of an answer that was to be made or interposed in that litigation on your behalf?

Mr. McDonald: Objection. Counsel knows that no answer was interposed. I object.

The Court: Well, the witness was asked whether he conferred about it. Objection is overruled.

You understand the question, Mr. Kirby?

The Witness: Yes, sir.

The Court: All right, you may answer.

A. I have no recollection of it.

Q. Now, do you know Mr. Thomas F. Daly, sir?

A. Mr. Daly of Lord, Day?

Q. Yes.

A. Yes, sir.

Q. Well, now, was he your attorney?

A. Yes, sir.

Q. When did he become your attorney?

A. Well, I wouldn't be able to tell you what year it was. All that I recall hearing was that there was a conflict [fol. 606] and for some reason White & Case were withdrawing and that Mr. Young, I think even without consultation with me, had selected Lord, Day & Lord, although I presume he at some point mentioned it to me, and I am not even positive that there was a conflict. Although my recollection is hazy, I remember that White & Case went more or less into the background, and Lord, Day & Lord carried on from that point.

Q. Mr. Kirby, do you have any recollection of ever having discussed with Mr. Thomas F. Daly of Lord, Day & Lord your version or the facts as you understand them in connection with the claims being advanced against you in Zenn-Anzalone?

A. No, I don't recall ever discussing with him. I think the main reason probably that I never discussed it with him, because he repeatedly stated that this suit was without merit, and I couldn't see very much use of taking his time or mine in discussing it.

Q. And did Mr. Daly ever tell you on what his conclusion was based?

A. No, I don't think he did, and I don't think I asked him.

* * * * * * *

[fol. 607] By Mr. Carter:

Q. Mr. Kirby, from the period 1955 through, say, September of 1959, covering roughly a four and a half year

period, how many times roughly did you talk to Thomas F. Daly?

A. I don't think over maybe three times. I cannot recall for sure, but that is about my recollection.

• • • • • • •

[fol. 608] Q. Now, do you recall that in connection with that proposed basic settlement, that among other conditions, the Murchison brothers were to return 130,000 voting shares of IDS in exchange for 130,000 non-voting?

A. I believe that is correct, sir.

Q. Now, were you, Mr. Kirby, as an individual, a proponent of that settlement before Referee Fitzsimmons?

A. Well, physically, you mean?

Q. Well, when I say proponent, I mean were you, through your chosen representatives, advocating the acceptance of that basic settlement?

Mr. McDonald: The record would speak for itself on that, your Honor.

The Court: I will let Mr. Kirby answer.

A. I was relying on the judgment of Mr. Young. My main thought was, let's get it out of the way.

Q. Well, whether or not you were relying upon his judgment, the point I would like to establish, sir, is whether or not you, through your chosen representatives, were advocating that basic $1 million settlement?

A. I don't think I was advocating it. I think I was [fol. 609] reluctantly agreeing to it.

Q. All right. And were your representatives asking Mr. Fitzsimmons, the referee, to approve that settlement?

A. That I cannot recall.

Q. Well, was Mr. Daly at that time, of Lord, Day & Lord, representing you, sir?

A. In 1956 we are talking about?

Q. Yes, sir.

A. I cannot recall that.

Q. Now, Mr. David Wallace was then in the employ of Alleghany Corporation, was he not, sir?

A. Yes, sir.

Q. He was an attorney, wasn't he?

A. Yes, sir.

Q. And was it part of his duty, as an attorney employed by the Alleghany Corporation, to keep abreast of the derivative litigation that was then in progress?

A. Yes, he was very familiar with it.

Q. And indeed, in fact, had you appointed David W. Wallace your attorney in fact in connection with the proceedings before Referee Fitzsimmons?

A. I can't recall whether I appointed him or whether it was automatic because of his being house counsel for [fol. 610] Alleghany.

Q. Well, in any event, irrespective of the appointment, did he have the authority to represent you in connection with that proposed basic settlement in 1956?

A. I think so.

Q. And did he affix his signature, if you know, on behalf of a proposed stipulation of settlement in connection with the $1 million offer?

Mr. Phillips: I don't like to interrupt on these technical questions but the record is quite clear there was no stipulation of settlement in 1956. There was one in 19—

The Court: If there is a document, why not produce it, Mr. Carter?

[fol. 611] Q. Mr. Kirby, I show you this document which has been marked in this court as Plaintiff's Exhibit 3 for identification, and I first call your attention to the name David Wallace there as attorney in fact, and ask you if that refreshes your recollection in connection with the Zenn v. Anzalone proposed settlement that David W. Wallace was acting as your attorney in fact?

A. I did not see the name of Mr. Young in this connection.

Q. Irrespective of that, could you answer my question, sir, based upon your perusal of that document?

A. No, I couldn't.

Q. In any event, Mr. Kirby, can you tell us whether [fol. 612] you had any knowledge of the content of Referee Fitzsimmons' report in connection with the proposed basic settlement, which report was dated in November, 1958?

A. This is in the State Court?

Q. Yes.

A. I don't think I ever read it.

Q. Were you generally familiar with its contents?

A. I knew Judge McGivern had approved the referee's report.

Q. Did you learn or did you have knowledge of the fact that Referee Fitzsimmons had recommended approval of the one million dollar basic settlement?

Q. When was this?

Q. 1958, sir.

A. I believe I am acquainted with that fact.

Q. So that the record will be clear, that was the settlement whereby you were to contribute $150,000 to the overall million, is that right?

A. Correct.

Q. Was the referee's approval of that proposed settlement satisfactory to you, sir? Were you willing to go along with it?

A. I would say it was acceptable.

* * * * * * *

[fol. 613] Q. Did Mr. Ireland tell you, in substance, that first he had been apprised of Judge Dimock's decision by Randolph Phillips?

A. I do not recall that he did, sir.

Q. Is it possible that he did and you do not recall it?

A. It could be.

Q. Do you have any recollection as to whether or not Mr. Ireland told you that Randolph Phillips had said that upon the resumption of the hearings before the referee you would be called as the plaintiff's first witness?

A. I have heard that statement made, but I cannot recall who said it or when.

* * * * * * *

[fol. 614] Q. As a matter of fact, Mr. Kirby, after receipt of that letter, didn't you set in motion a series of events which led you to offer the plaintiffs in the derivative actions the sum of $900,000 to settle your individual liability?

A. That was done late in the fall of 1959, yes.

Q. Mr. Daly's letter, are we agreed, was in the fall of 1959, namely, October 22nd?

A. If the letter had never been written, I would have done exactly what I did. It has no bearing whatsoever.

* * * * * * *

[fol. 615] Q. Well, now, do you know that for a period of several months prior thereto someone on your behalf was conducting negotiations with Randolph Phillips looking toward a settlement of your liability? Do you know that?

A. Oh, yes, yes, I know that.

Q. All right. Who was that?

A. That was Mr. Charles Ireland.

Q. Now, did you authorize Mr. Ireland to be your representative to attain this objective?

The Witness: Your Honor, I think I have answered this question now about three times. Shall I answer it again?

The Court: Give an answer again.

A. Yes, sir.

* * * * * * *

[fol. 616] By Mr. Updike:

Q. Mr. Kirby, I believe you testified yesterday that you knew of the existence of the Zenn v. Anzalone in the State Court as well as Zenn v. Anzalone in this court although I believe it is clear on the record here that you were not served as a defendant in the State Court case. Do you recall testifying about that yesterday?

A. Yes, sir.

Q. In 1955 and 1956 when the litigation was going forward do you recall that there were hearings held before a man who had been designated as referee in the State Court

and special master in this court whose name was Fitz-
[fol. 617] simmons?

A. Yes, sir.

Q. You did not testify, sir, in those proceedings, did you?

A. No, sir.

Q. Did you discuss in the course of those proceedings Mr. Young's testimony with him?

A. No, sir.

Q. I believe you testified yesterday that speaking now with reference to the transaction about which you acquired some 24,000 shares of the Class A stock of IDS back in 1950, speaking with reference to that alone, my understanding is you testified yesterday that you did not discuss with Mr. Daly the merits of that case. Am I wrong about that, sir?

A. I don't remember ever discussing it with Mr. Daly.

Q. Did you ever tell Mr. Daly that you had records in your office out in Morristown with respect to that transaction?

A. I have no recollection of it.

Q. Do you recall, sir, whether you were ever called upon by anyone to produce your files from Morristown in that connection?

[fol. 618] A. I can't pick those files out particularly. I have produced lots of my files for preparation of this case.

Q. The present case?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Now, directing your mind to the fall of 1959, you testified sir, to your general familiarity with the fact there were proceedings before Judge Dimock in this court and followed by proceedings before Judge McGivern in the New York State Court. Do you recall that, sir?

A. Yes, sir.

Q. Following that the question of the settlement of the entire litigation, both state and federal, came before the Alleghany board on the 29th or 30th of December, 1959, isn't that so?

A. I believe so.

Q. At that time was there anyone on the Alleghany board who was also a member of that board back in December, 1949?

A. Well, I would have to think about that for—I can't recall who was on the board in 1949 to say nothing of [fol. 619] 1959.

* * * * * * *

[fol. 620] Mr. Updike: I will ask Mr. McDonald for a stipulation. Would you agree, Mr. McDonald, that the only director of Alleghany that was a director in December, 1959, who was also a director on December 6, 1949, was this witness, Mr. Kirby?

Mr. McDonald: Your Honor, I would stipulate whatever the facts. I can't take them out of the top of my head. As soon as we have time to check I will stipulate.

The Court: You check it.

Mr. Updike: Subject to correction, sir.

By Mr. Updike:

Q. Now, when the matter of the settlement came before the Alleghany board in December, 1959, did you make any statement, sir, to the members of the board with respect to the merits of this transaction by which you received 24,000 Class A IDS shares?

A. In 1949?

Q. 1959, sir.

A. I think that everything in connection with the settlement of the lawsuit was explained by Mr. Newton who I [fol. 621] think—

Q. Could it have been Mr. Teitelbaum?

A. It could have been either Mr. Newton or Mr. Teitelbaum or maybe both of them.

Q. As far as you recall you did not make any statement with respect to the merits of that transaction to that board?

A. I have no recollection of it.

Q. Did you ever tell that board that you had documentary material in your files in Morristown that bore on the merits of that transaction?

A. Well, are you telling me that I did have?

Q. I am just asking you if you made any such statement to that board.

A. I don't know whether I did have.

Mr. Whittlesey: I will question the relevancy of that question.

The Court: I will allow it. He said he doesn't know whether he did or not.

Q. Under date of January 29, 1963, you swore to some answers to interrogatories propounded by the plaintiff in this case which I now show you and ask you if you recall having sworn to those answers at or about that date?

* * * * * * *

[fol. 622] Mr. Whittlesey: Of course we will stipulate that it is signed.

Q. It is stipulated by Mr. Whittlesey, sir. Do you recall that your counsel went through your files out there, sir, in a search of documents pursuant to our request that were relevant to the answers that we sought?

A. Well, all I can tell you is that I know that different people from the office of Donovan, Leisure made a thorough search of my files for all kinds of documents but I don't know about any particular ones.

Q. They have come up here with some eight pages of itemization of documents with respect to this case.

The Court: That is in the nature of a pleading anyway.

Mr. Updike: The documentary part begins at page 6, your Honor, and runs through page 13.

[fol. 623] The Court: What was the question in the interrogatory IV?

Mr. Updike: It called for documents relevant to the 1950 IDS exchange transaction within the meaning of the allegations in our complaint.

Mr. Whittlesey: I wonder if the interrogatories themselves to which the answers were put in shouldn't also be put in because I don't think—

The Court: Read the interrogatory IV.

Mr. Whittlesey: "List and describe including dates, persons involved and subject matter each letter, report, memorandum, working paper or other writings concerning IDS, its financial condition or prospects and any proposed or executed transaction in the capital stock of IDS or its subsidiaries or affiliates prepared by or for or referring or relating to any of the persons or entities enumerated in paragraphs I,(1) through I(13) above during the period November 11, 1948, through May 18, 1950, and received by you in the period November 11, 1948, through December 30, 1959."

The Court: All right. We have the answer. What is next?

Q. Going back to 1949, Mr. Kirby, did you first learn about the possible acquisition by Alleghany of IDS in the [fol. 624] fall of 1948?

A. I don't remember when.

Q. I show you, sir, Plaintiff's Exhibit 300 for identification and ask you if you can recognize this as a copy from your file of a letter that you wrote to Mr. Robert Purcell?

Mr. Updike: It is a little hard to read. Do you have another one?

Mr. Whittlesey: Mine is just as bad.

The Court: The witness says he can't read a lot of it but it is his typewriter so probably it is a letter you wrote?

The Witness: Yes, I assume so.

Mr. Whittlesey: Here is a clearer one.

Q. Mr. Whittlesey has produced one that is much more legible, sir.

A. It sounds very much like a letter I wrote but I don't understand why in reproducing it why my signature isn't at the end. It is typed.

Mr. Updike: Was it typed at the Donovan, Leisure office?

Mr. Whittlesey: I think the reason it is typed is that we copied it from one of the exhibits in the Zenn case in which this particular letter was introduced as Exhibit 392. [fol. 625] That was our source of the particular document.

The Court: All right, go ahead.

Mr. Updike: Is there any question as to the authenticity of the letter as far as the witness is concerned?

Mr. Whittlesey: No, I have no question about that. I assume the one you produced was a carbon copy in his files. The black one was the original that went into the Zenn transcript.

Mr. Updike: The one that you produced is the one that you furnished to my firm.

Mr. Whittlesey: That naturally was a copy in Mr. Kirby's files and didn't have his signature on it.

The Witness: I am perfectly willing to concede it is a letter I wrote.

Q. Very well, sir. Does this refresh your recollection first of all that the possibility of an IDS acquisition by Alleghany come up some time in the fall of that year, this letter being dated December 20, 1948?

A. Yes, sir.

Q. Do you recall, sir, that the information available with respect to IDS was incomplete and sparse?

A. The information was incomplete?

[fol. 626] Q. At that time.

A. You mean information being furnished us by whoever was representing the seller?

Q. Well, I will withdraw that question and start with another. In the beginning, sir, do you recall that Alleghany asked a Mr. Stiver and Mr. Shipman to prepare reports with respect to this prospect to Alleghany?

A. I have heard the name Stiver. I don't know who he was with or what connection he had. I know Mr. Shipman was connected with Alleghany and did work in a statistical department and that he made studies of IDS, yes.

Q. He was a security analyst that had come to Alleghany from Standard & Poor's?

A. I don't know where he came from.

Q. You don't recall that?

A. I don't recall where he came from. I remember he was there.

Q. I show you Plaintiff's Exhibit 358 for identification and ask you if you recognize that exhibit and whether if you do recognize it it refreshes your recollection as to who Mr. Stiver was?

A. I don't think my recollection would be refreshed by [fol. 627] this. That is a letter addressed to Mr. Young. I have very grave doubt that I ever saw the letter. Practically all of my contacts insofar as IDS, the purchase of IDS securities was concerned were with Mr. Young, Mr. Purcell and a couple of occasions with Mr. Gamble who was going to do the selling.

Q. You have talked frequently with Mr. Young about his acquisition, did you not, sir?

A. I don't know what you mean by frequently. Several times I guess, yes.

Q. I believe it is on the record that the acquisition took place on April 27, 1949, so that between the date of the letter that was just identified, December 20th and April 27th, we have a period of about four months.

During that period of time did you talk with Mr. Young on a number of occasions?

A. Between April 28th did you say?

Q. Between December 20, 1948, and April 27, 1949.

A. I don't believe more than three times.

Q. During that period you also talked with Mr. Shipman, did you not?

A. I know that Mr. Shipman testified that he came out to my office to see me, to talk about IDS but I don't recall [fol. 628] him coming out and I don't recall the conversation. But I have no doubt what he said is true.

Q. Going back to Plaintiff's Exhibit 300 for identification—

Mr. Updike: May we have the clearer copy, your Honor?
The Court: Surely.

Q. If you will read that, sir, doesn't that refresh your recollection that it was on that date that you had seen Mr. Shipman?

A. Well, I see what it says but I don't remember the conversation with Mr. Shipman.

Q. The question is not whether you remember the conversation.

A. It doesn't refresh my recollection at all.

Q. Does it refresh your memory that you had a conversation with Mr. Shipman?

A. No, it doesn't.

Q. The opening sentence, sir, "I have just completed a conversation with Mr. Shipman on the subject of Investors Syndicate." This is your own letter. Does it refresh your memory?

A. No, not a bit, not in the slightest. I am not denying this conversation took place but as I said before I have no [fol. 629] recollection of it. 1948 is quite a while back.

Mr. Updike: I offer Plaintiff's Exhibit 300 for identification in evidence.

The Court: Received in evidence.

(Plaintiff's Exhibit 300 received.)

Mr. Whittlesey: I would like to ask, if I may, your Honor, of Mr. Updike, on what basis this is being offered in evidence, as proof of what?

Mr. Updike: This is being offered as proof of this witness' personal knowledge with respect to the affairs of IDS in late 1948.

The Court: It shows that the problem of the acquisition of IDS was brought to his attention in 1948, that's about all.

Mr. Updike: And that he had had a meeting with Mr. Shipman whom he has identified on the record.

* * * * * * *

[fol. 630] Mr. Whittlesey: This particular letter, and everything that is stated in it, was introduced in the Zenn hearing as Exhibit 392.

The Court: That is a good rebuttal fact for you.

Mr. Whittlesey: That's right.

The Court: But why are you arguing about it? I mean, this is merely background.

Mr. Whittlesey: I think we are going to have a lot of it. Now, the charge here in this complaint is that Mr. Kirby has failed to adduce facts before the referee in the Zenn hearing which he knew at the time of the 1950 exchange transaction. As far as any facts in this thing appear, they were adduced in the Zenn hearing.

The Court: It is background.

Mr. Updike: That is right, sir.

* * * * * * *

[fol. 631] Mr. Whittlesey: There is just one further thing. I would like to ask Mr. Updike—it might simplify this part of the trial—is he willing to stipulate that this exhibit which he has just offered was also an exhibit in evidence as 392 in the hearings in Zenn v. Anzalone?

Mr. Updike: I am quite willing to stipulate that with respect to each one of these where it appears on the face of the document.

The Court: All right. We will take it that that was in the Zenn v. Anzalone hearing.

* * * * * * *

[fol. 632] Q. Now, I show you, Mr. Kirby, Plaintiff's Exhibit 303 for identification and ask you if you recognize that as a memorandum addressed to you from your file in Morristown?

A. Well, this is an analysis of—

Q. No, that isn't my question, sir.

The Court: Do you recognize that as something coming from your file?

The Witness: No, sir, I do not.

Q. Do you recognize the initials EYB at the end?

A. I do.

Q. Whose initials were EYB?

A. Edward Y. Beaugeard.

Q. Who was Mr. Beaugeard?

A. Mr. Beaugeard at one time was assistant secretary of Alleghany, and he is now in my office.

Mr. Whittlesey: If your Honor please, to save time, I will stipulate that this particular memorandum was produced out of Mr. Kirby's files.

The Court: All right.

Mr. Updike: I offer it in evidence.

The Court: Let me look at it.

* * * * * * * *

[fol. 633] The Court: Wait a minute. Now, what is the particular relevancy of this document?

Mr. Updike: The particular relevancy appears about two-third of the way down of page 1, your Honor, where [fol. 634] it shows that there are projections with respect to the future prospects of IDS, and that this was information to this witness that projections were part of the normal business routine at IDS.

The Court: All right. Well, that shows he got a statement of what the projections of the business would be as supplied to the SEC.

Mr. Whittlesey: This is a statement of information that is available in the SEC file.

The Court: I will receive it in evidence.

* * * * * * *

[fol. 635] By Mr. Updike:

Q. The next question is, Mr. Kirby, in connection with your consideration of this acquisition of IDS by Alleghany, [fol. 636] do you recall seeking the assistance of persons other than Mr. Shipman and possibly Mr. Stiver?

A. I didn't secure the assistance of either of them.

Q. Well, when I say "you," let's say the Alleghany Corporation of which you were then the president. I use it in

that sense, sir. Do you recall receiving or asking for assistance from persons other than those two?

A. Well, I would say only Mr. Purcell, who was an officer.

Q. Did you talk with Mr. Purcell about it a number of times?

A. I said a few minutes ago that my contact in regard to whether or not we should purchase IDS was with Mr. Young and with Mr. Purcell for the most part.

[fol. 637] Q. Yes. How about Mr. McKinney?

A. Robert McKinney?

Q. Yes, sir.

A. No, I don't think that he played any important part. I believe at that time he was in my office. He may have sat in on some of the conferences, but I do not think he knew any more about it than I did.

Q. Do you recall seeking the guidance of Mr. Bateman or any assistance from him?

A. No. Mr. Bateman, I believe, was on the board at that time, and I think he was quite interested, but I don't recall asking him for any assistance. He may have written some letters and expressed some opinions. Whether they were at my request or Mr. Young's request I haven't the faintest idea, if such memorandums exist.

Q. Mr. Kirby, I show you Plaintiff's Exhibit 310 for identification, which has been produced by your counsel out of our files, and ask you if you can identify that for this record?

A. No, I cannot identify it. I don't remember ever seeing it before.

Mr. Updike: Mr. Whittlesey, will you stipulate that it [fol. 638] came from Mr. Kirby's files in Morrison?

Mr. Whittlesey: Oh, yes.

Mr. Updike: I offer it in evidence.

* * * * * * *

The Court: Let me look at it.

This is a report from Saunders, Stiver & Company, dated March 15, 1949.

Mr. Updike: Yes, sir.

The Court: Addressed to Alleghany Corporation, atten-
[fol. 639] tion Mr. Purcell, vice-chairman.

Any objection?

Mr. Whittlesey: Yes, your Honor.

I object to the receipt of that on the issues we are trying here and on the ground that this report is identified in exhibits before the referee in Zenn v. Anzalone, specifically Exhibit 393.

The Court: Is this an exhibit presented to the referee in Zenn v. Anzalone?

Mr. Whittlesey: I did not mean to say that, your Honor. It is identified by name and date in an exhibit presented to the referee. In other words, knowledge of the existence of this memorandum was before the referee and known to the parties in that litigation, so on any charge that we are trying here of failure of this defendant to adduce this report or this evidence, it was available to the referee and to the parties trying the Zenn v. Anzalone case.

The Court: Well, we understand it was referred to in the document. I will take it in evidence for what it is worth. Let us get to the point of what documents this witness did
[fol. 640] not produce that he should have produced.

Mr. Updike: This particular one is one of those which was not produced that we say he had an affirmative duty to produce.

The Court: Even though in the document given to the referee, the existence of this document was disclosed?

Mr. Updike: I think that is correct, sir.

The Court: Mr. Whittlesey, do you have the document in which this was disclosed to the referee? Let me see that.

Mr. Whittlesey: Yes, I will be very happy to show that to you, your Honor.

* * * * * * *

The Court: Let me see that, Mr. Updike.

[fol. 641] Mr. Updike: Yes, sir.

Mr. Whittlesey identifies the second full paragraph, I believe—no, it is the beginning of the third paragraph on page 6 of this particular exhibit.

May we have what the witness is saying on the record, your Honor?

The Court: He is saying what every witness says, that people come into his office and take all his papers away from him. I get that on every trial.

Well, this is a separate analysis of Investors Syndicate, Mr. Whittlesey.

Mr. Whittlesey: That is quite right, your Honor.

The Court: All right.

Mr. Updike: It is some four or five months later.

The Court: It doesn't indicate exactly what I thought you contended, Mr. Whittlesey.

All right, what is the next question?

Mr. Updike: I would like to draw your attention to the fact that the report of the referee at page 43 refers to [fol. 642] a different Stiver report, but not to this present one which was much more favorable to the transaction then under consideration.

The Court: 310 for identification is received in evidence.

(Plaintiff's Exhibit 310 received.)

Q. Mr. Kirby, do you recall being concerned about the actuarial soundness of the IDS activities prior to the acquisition by Alleghany?

A. I don't remember that in particular. I remember being very concerned about all aspects of IDS.

Q. Well, I show you, sir, Plaintiff's Exhibit 313 for identification, merely for the purpose of asking if that refreshes your recollection that you wrote to an actuary seeking his assistance in connection with this analysis for IDS?

A. It is just one point—

The Court: Did you do that?

The Witness: Yes, sir.

The Court: All right.

Mr. Updike: I do not offer it in evidence. I just wanted to refresh the witness' recollection.

The Court: All right.

[fol. 643] Q. Do you also recall, Mr. Kirby, that you were concerned about the possibility of personal liability on your part and on the part of the other directors of Alleghany to the security holders of IDS?

A. Well, I don't know about Alleghany. I felt a very great moral responsibility—I would have felt a very great moral responsibility if we were going to buy IDS, if not legal. I just felt that the company was in such bad shape that it could very well go into bankruptcy, and I did not like the idea of dealing in the amount of money going to other people that was involved.

Q. Well, now, isn't it the fact, sir, that you asked for and received an opinion of White & Case in New York and an opinion from the firm of Burgess & Fullmer out in Cleveland before Alleghany acquired IDS?

A. I don't remember of asking for such an opinion, although I might have. Never having heard of Burgess & Fullmer I would doubt very much if I asked for an opinion.

Q. I show you, sir, Plaintiff's Exhibit 324 for identification and Plaintiff's Exhibit 323 for identification, each of [fol. 644] which has been produced from your files in Morristown, and ask you if you can identify each of those?

A. You call this asking for an opinion from Burgess—

The Court: Can you identify it?

The Witness: No, sir, I can't.

The Court: That is the answer.

Mr. Updike: Mr. Whittlesey, will you stipulate that these came from Mr. Kirby's files, sir?

Mr. Whittlesey: Those two? Oh, yes.

Mr. Updike: I offer them in evidence.

The Court: What is the relevancy?

Mr. Updike: The relevancy is that 323 for identification is a supplement to 324. 324 was an exhibit introduced before the referee in Zenn, but 323, the supplement, was not introduced before him, and it deals precisely with the question which I addressed to Mr. Kirby, to wit, the legal opinions of White & Case and Burgess & Fullmer.

The Court: Let me see it.

Mr. Updike: The legal opinions in each instance dealing with the liability, possible liability of the directors of [fol. 645] Alleghany in the event they acquired IDS.

The Court: What is the point of it? I don't quite see. This is a memorandum. It doesn't say who wrote it, who it was sent to, or anything about it.

Mr. Updike: This is a supplement, sir.

May I look at it a moment? It is identified at the top as supplement to analysis of Investors Syndicate, Inc. It bears the initials C.S., which stand for Charles Shipman, which have been identified on his deposition.

The Court: Why not introduce it in his deposition if it means anything? I do not quite understand what you are driving at in all these things, Mr. Updike. You mean that this particular document should have been produced before the referee in Zenn v. Anzalone?

Mr. Updike: I believe it was relevant, yes, sir.

The Court: All right, I have looked at it. What particular thing in there is relevant to the charge that you have made in that particular document?

[fol. 646] Mr. Updike: This document is important, sir, because this witness, although his recollection now is not clear, made a very searching examination into the affairs of IDS at this time, I mean at the relevant time back in 1949, even to the point of raising a question with respect to the actuarial soundness of IDS, and that it was only after he was satisfied by reference to Plaintiff's Exhibit 323 for identification that IDS had been audited by one of the best known independent accountant and actuarial firms, experienced in auditing insurance and related businesses, that he was prepared to approve this transaction.

The Court: The transaction being the acquisition of IDS by Alleghany?

Mr. Updike: Yes.

The Court: All right.

The objection to the receipt of it is sustained. I cannot see what relevance it has to the issue.

Mr. Updike: Because it refers—

The Court: A lot of things refer. You can go back to the garden of Eden and get reference to everything that has happened since Adam and Eve, but lots of things [fol. 647] may refer.

You are saying there was certain particular information that this witness had at the time of the 1950 transaction that he did not reveal to the referee. Now, this is all so far background. It has nothing to do with it. I assume that the man who is president of the corporation makes some study to find out whether he can legally acquire a corporation or not. That is what this memorandum indicates. They got an opinion from counsel. They had the legal right to acquire it. What bearing has that got on the allegations of this complaint?

Mr. Updike: Well, it is because this identifies the so-called Froggett & Company reports which had been made with respect to IDS for years and which in themselves contain projections, forward projections every year for the next five years, and I say they should have been produced.

The Court: Let's get them. Let us not go back to ancient history. Everything that identifies Froggett reports isn't necessarily relevant. All I am trying to do, Mr. Updike, is to get to the essential facts.

[fol. 648] Mr. Updike: Yes, I understand you want to move it along faster.

By Mr. Updike:

Q. I show you Plaintiff's Exhibit 329 for identification, Mr. Kirby, which has been produced by your counsel as coming from your files and ask if you can identify it, sir.

A. I have seen this document.

The Court: Say it loud enough.

A. I have seen this document in the last couple of weeks, but that is the first that I recall having received it.

Mr. Updike: I offer it in evidence, sir.

The Court: Let me look at it.

Mr. Whittlesey: I maybe can save some time, your Honor, if Mr. Updike will stipulate that this document was

offered and received in evidence before the referee in Zenn v. Anzalone as Exhibit 317. As to that I have no objection.

Mr. Updike: I will so stipulate; yes, sir.

Mr. McDonald: Well, I object.

The Court: You have no objection to it going in?

Mr. McDonald: I object to it going in, your Honor, [fol. 649] on my side of the case because I see no point in burdening the record in this case with documents which are duplicates of exhibits which were before the referee in Zenn. How in the world could we be charged—

The Court: What is the point of it, Mr. Updike?

Mr. Updike: The point of it is, sir, that when your Honor comes to consider these documents you cannot just consider the documents that were not before the referee. This is part of a more complete picture. I am not going to put them all in. I am skipping a great many.

The Court: What I am interested in is what is it you say that Mr. Kirby concealed from the referee. Now, if he did not conceal it from the referee, what point does it have in this case? What did he conceal? Let's get to that.

Mr. Updike: Very good, sir. Have you ruled with respect to the exhibit?

The Court: Well, if you will stipulate that this 329 for identification was revealed to the referee in Zenn v. Anzalone, then I will sustain an objection as being irrelevant to [fol. 650] this cause of action.

Mr. Updike: This will give your Honor a distorted picture of the amount of information that this witness had with respect to this transaction that—

The Court: What did he fail to reveal? Why not get to that point?

Mr. Updike: Well, in order to understand the omissions and the significance of the omissions, I have to put in at least a scattered few of these documents. I am not offering them all from the witness' file.

The Court: The point you are making here is that the witness held back something from the referee. Now, this document he gave to the referee. Anything that he learned

from this he gave to the referee. Therefore it seems to me it is irrelevant to the issue in this case.

Now, if you have got something you say is significant that he did not give to the referee, why not get to that? Otherwise we are going to be here until Christmas.

Mr. Updike: Well, I assure you, sir, I do not believe that is so, and the exclusion of this is going to produce a dis-
[fol. 651] torted picture for this Court, but I will go forward.

The Court: I will exclude it at the present time. If it was given to the referee, I see no purpose in burdening this record with it. So I will sustain an objection to 329 for identification.

Mr. Updike: May I just ask the witness a question or two about it?

The Court: Surely.

By Mr. Updike:

Q. Mr. Kirby, do you recall that Mr. Young—

A. Who?

Q. —submitted to you a draft of a proposed letter that he was sending to the Alleghany board?

A. Who?

Q. Mr. Young.

A. No, I don't recall it.

Q. This document is a memorandum, sir, addressed to you, and bears the initials—

A. Yes, but I don't recall it.

Q. You have no recollection of it at all?

A. No, I haven't. None at all. And I don't believe you would have if it had been addressed to you 15 years later.
[fol. 652] Q. When the board considered and passed upon the acquisition of IDS, did you, sir, vote in favor of that acquisition?

A. I am sure I did.

Q. And were you at that time of the view that it was a desirable acquisition for Alleghany?

A. I wasn't at all sure of it. I was willing to abide by the judgment of Mr. Young to a large extent. He had made a much, much more thorough study of it than I had.

Mr. Updike: Well, now, if the Court please, this is one of the reasons why the document you just excluded is relevant. This witness made a very careful examination of this business, sir.

The Court: All right. What is it that he excluded? I mean, let's get to the point. What didn't he reveal to the referee? That is the important thing. I assume that here —he was a director of the company—I assume he made some study of it. What is it he did not reveal to the referee? [fol. 653] Mr. Updike: He was under a duty, sir, to come forward with information with respect to everything that he knew about this business, at least—

The Court: What didn't he? You are offering something that he came forward with and gave to the referee. What I say is let's get to the issue what he didn't come forward with then we can understand this case a little better, if you get to that.

Mr. Updike: You will only get the sum total of his knowledge by including that which he did produce with that which was not produced.

The Court: I would like to see what he didn't produce and then if we need something to explain the significance we may consider the other documents.

By Mr. Updike:

Q. Mr. Kirby, I show you Plaintiff's Exhibit 218 for identification which purports to be a copy of the resolutions of the executive committee of Alleghany dated April 27, 1949. I draw your attention to what appears to be your signature on the second page of the exhibit.

Mr. Kissam: Your Honor, can we have the document for a [illegible]?

The Court: What is your question?

[fol. 654] Q. Do you recall, sir, that before Alleghany acquired control of IDS the board authorized the purchase of some Class A IDS shares?

Mr. McDonald: I object to this.

The Court: I will allow him to answer that.

The Witness: I will have to ask that the question be read.

The Court: Read the question.

(Question read.)

A. I have no recollection.

Q. Do you recall, sir, just looking at the opening paragraph of the exhibit—do you have the exhibit? Just look at the opening paragraph of that exhibit. Does that refresh your recollection that the executive committee of which you were a member authorized the purchase of 13,000 shares of Investors Syndicate voting common at $10 a share?

A. I don't have any recollection of it but that is what the resolution says and it bears my signature so I have no question that is what happened.

Q. You have no recollection of it at all?

Mr. Updike: I offer it in evidence if the Court please.

The Court: To show that in April 27, 1949, Alleghany [fol. 654a] Corporation authorized the purchase of 13,000 shares of Investors Syndicate voting common stock at $10 per share?

Mr. Updike: That is what it is for.

The Court: Can it be stipulated this is the resolution passed?

Mr. Whittlesey: I would like to ask Mr. Updike first to stipulate this was an exhibit, namely 365-B before the referee in Zenn v. Anzalone.

Mr. Updike: Yes, sir.

Mr. McDonald: I object to its being in evidence.

The Court: We don't need it in evidence, it is stipulated.

Q. I show you Plaintiff's Exhibit 219 for identification. I draw your attention to the signature at the bottom of that exhibit, Mr. Kirby.

A. Yes, sir. What is it you want?

Q. Look at the second paragraph of that exhibit, please.

The Court: What is your question?

Q. The second paragraph authorized the acquisition of 75,000 shares of Class A IDS stock, is that right, Mr. Kirby?

[fol. 655] A. Well—

The Court: That is what it says.

Q. And the price not to exceed $12.50 per share. Am I correct about that, sir?

The Court: That is what the resolution says. Now, Mr. Whittlesey, there is no dispute, is there that those resolutions were adopted?

Mr. McDonald: They were adopted and put in evidence before the referee as Exhibit 365-A.

The Court: All right, then why do we need the document?

Mr. Updike: I don't need the document if that is conceded.

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[fol. 656] Mr. McDonald: Your Honor, on Friday Mr. Updike asked me to stipulate that the only member in common of the Alleghany board of directors in December 1949 and in December 1959 was Mr. Allan P. Kirby, Sr., and to the best of my knowledge that is correct and I so stipulate. I haven't actually seen a 1949 report, but I am sure that must be right.

The Court: Then that will be stipulated subject to correction.

ALLAN P. KIRBY, resumed.

Direct examination.

By Mr. Updike (Continued):

Q. Mr. Kirby, after Alleghany acquired control of IDS, did you make a particular study of IDS affairs?

A. After it acquired control?

[fol. 657] Q. Yes.

A. No, I don't recall that I did.

Q. Do you recall asking for a Froggatt report which I now show you and which has been marked Plaintiff's Exhibit 220?

A. What is it you want me to answer in regard to this?

The Court: Do you recall asking for it?

A. No, I never asked for it as I recall. This is addressed to the board of directors of IDS, and I wasn't even on the board of directors of IDS.

The Court: You did not ask for it?

The Witness: No.

Q. Don't you recall seeing that in August of 1949?

A. I certainly do not.

Q. I show you documents produced by your counsel from your own file, sir, which have been marked Plaintiff's Exhibit 331 for identification, and I ask you if you will please look at the second page first and then the top page afterwards and see if that does not refresh your recollection that you did ask for Plaintiff's Exhibit 220?

A. I cannot say that it did not come out.

[fol. 658] The Court: Did you ask for the Froggatt report?

The Witness: I have no recollection of it, sir.

Mr. Updike: I offer 331 for identification in evidence.

The Court: Let me just see it.

Mr. Kissam: I wonder what the relevancy of this is.

Does this establish anything in and by itself other than the fact that it is a report?

The Court: What is the relevancy of this?

Mr. Updike: When we closed on Friday, sir, you asked me to turn my attention directly to matters known to this witness, but which did not come into evidence before the referee. This Froggatt report is the first of those particular documents, sir.

Plaintiff's Exhibit 331 merely shows that the witness asked for it, received it, and the final notation of the top page shows that Mr. Baugeard returned the actuarial report by notation showing September 2, 1949.

The Court: I think you can ask some preliminary questions here to get the information in pretty easily.

[fol. 659] Who was Mr. Baugeard?

The Witness: He is an analyst in my office, and he could very easily have asked for it in my name and I could very well never have seen it, because he is constantly studying securities of all kinds for me. He is still in my office.

The Court: But you have no recollection of seeing it?

The Witness: I have not.

The Court: Or of asking for it?

The Witness: I don't see anything in there that indicates that I asked for it. I thought it was Baugeard—

The Court: This memorandum from Mr. Shipman addressed to you says that Mr. Baugeard had told him you wanted it.

The Witness: He could have asked for it in my name.

The Court: But you have no recollection of it?

The Witness: I have no recollection of it.

Mr. Updike: The top memorandum, if the Court please, is addressed to Mr. Kirby and it is signed by Mr. Baugeard, and it starts out with the sentence, addressed to this witness:

[fol. 660] "Mr. Shipman telephoned me this morning to say that he had received the latest actuarial report on Investors Diversified Services and is sending it out to you."

The Court: Who is Mr. Shipman?

The Witness: Mr. Shipman was an analyst in the Allegheny office.

Mr. Updike: He is the man who made the principal study.

The Court: This memorandum, did you ever receive this memorandum which is addressed to you, Mr. Kirby?

The Witness: I would not deny receiving it, but I do not recall it. I can imagine that it came in the mail and it was opened and passed on to Mr. Baugeard for his attention without my possibly seeing it.

The Court: I cannot see that these memoranda prove anything contrary to what Mr. Kirby is saying. He says he has no recollection. These things may have come through his office. I don't think those memoranda are evidence in themselves.

Mr. Updike: They come from Mr. Kirby's file.

[fol. 661] The Court: But in and of themselves they do not prove anything contrary to what Mr. Kirby is saying.

Mr. Updike: If all he is saying is that he has no recollection of seeing them—

The Court: That is all he is saying.

Mr. Updike: Then I submit they are admissible in evidence in any event, whether he recalls them or not.

The Court: Not those pieces of paper by themselves. You will have to get Mr. Baugeard or somebody like that to identify them. Mr. Kirby simply says he has no recollection of seeing them. Here is a memorandum from somebody to somebody who is an analyst saying that Mr. Kirby asked for it and he is sending it to him. Is that proof that Mr. Kirby saw it?

Mr. Updike: That is not proof he saw it, but the memorandum from Mr. Baugeard, who is Mr. Kirby's amanuensis out in Morristown, addressed to Mr. Kirby himself, is evidence that Mr. Kirby saw it.

The Court: If Mr. Kirby saw the memorandum. However, he has no recollection of seeing that memorandum, he says.

[fol. 662] Mr. Updike: Well, I submit that this is a piece of paper which is the concurrent piece of evidence, so to speak, which overcomes his mere lack of recollection. He doesn't say he never saw it.

The Court: Something could be used to refresh his recollection. He has looked at it and says it does not refresh his recollection.

Mr. Updike: Well, I offer it in evidence.

The Court: I will sustain the objection to it. I think it is irrelevant on the present state of the record.

Mr. Updike: Well, I offer in evidence Plaintiff's Exhibit 220 for identification which is the Froggatt report itself, sir.

The Court: This was addressed to the Board of Directors of Investors Diversified Service?

Mr. Updike: Yes, sir.

The Court: Were you a member of that board, Mr. Kirby?

The Witness: No, sir, I was not.

The Court: Don't you have to do something to connect that with Mr. Kirby?

Mr. Updike: I submit, sir, that Plaintiff's Exhibit 331 is the document which is identified in the memorandum that I just offered, and this is clear evidence as against a [fol. 663] mere lack of recollection on the part of the witness, this is clear evidence, it seems to me, and admissible evidence that that document that is now before your Honor came to Mr. Kirby and was studied by him during the period indicated by Plaintiff's Exhibit 331.

The Court: Well, I think Mr. Kirby has indicated that his analyst may well have asked for it in his name; it may have come through his office, but where is the proof that he actually studied it, as you say?

Mr. Updike: The proof—

The Court: It may have come through his office, true; he admits that.

Mr. Updike: It may have come through his office, but here is a memorandum addressed to him, which refers to this—

The Court: Yes, that's right, but you say that it is true that he studied it.

Mr. Updike: Well, it is proof that it came to him. I would like to ask him what study he made.

The Court: Mr. Kirby admits that this document may have come through his office. Now, it is one thing for something to come through an office, another thing to say that the man has studied the document.

[fol. 664] Mr. Updike: I quite agree.

The Court: Lots of things come to my desk in the morning that I do not study.

Mr. Updike: I would like to ask him specific questions about—

The Court: Why don't you ask him? I will receive this for identification and then you ask him the questions.

By Mr. Updike:

Q. Mr. Kirby, do you recall that IDS employed a firm known as Froggatt & Company for the purpose of making both accounting and actuarial studies with reference to the operations of IDS?

A. I have no recollection of it. I don't think I have ever heard the name until the past week or so.

Q. Do you recall, sir, that you were interested in the actuarial aspects of IDS even before Alleghany acquired IDS?

A. I was very interested in what responsibility Alleghany Corporation would be assuming if it bought control of IDS, if that is what you mean.

Q. That is part of what I mean, but didn't you specifically interest yourself in the actuarial aspects of IDS to the extent of writing to a Mr. MacLean who was a well [fol. 665] known actuary, to enlist his assistance to Alleghany in connection with the acquisition of IDS?

A. Well, I recall writing to Mr. MacLean, yes, only because my memory has been refreshed during these past several weeks. I may have done it in the interests of Alleghany without ever seeing—I don't recall his making a

report. In fact, as I remember it, he was not able to do the work.

Q. Yes, and thereafter didn't you ask Mr. Shipman to make certain that some actuarial advice was available to Alleghany before you were prepared to go along with Alleghany's acquisition of IDS?

A. I could have.

Q. Well, I show you Plaintiff's Exhibit 323 for identification, which is a document again from Mr. Kirby's own file, and I direct your attention to the first paragraph of this exhibit, the first two paragraphs of the exhibit, and ask you, sir, if you read that memorandum at or about the date that it bears.

I do not object to your reading the latter part of it, but I drew your attention specifically, sir, to the first two paragraphs.

The Court: The question is whether he recalls having received it?

[fol. 666] A. I wouldn't deny that I had seen it, but I have no recollection of having seen it.

Mr. Updike: I offer it in evidence, sir.

The Court: You do not deny that you did see it?

The Witness: No, sir.

The Court: All right, received in evidence.

Mr. Whittlesey: I might point out, your Honor, that when that was offered on Friday your Honor refused to receive it in evidence as irrelevant, and I still do not see the relevancy.

Mr. Updike: The relevancy is that it identifies and refers to Joseph Froggatt & Company, but the witness a moment ago stated that he did not believe he heard of them except within the last week or two.

The Court: Well, I will receive it in evidence.

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[fol. 667] (Plaintiff's Exhibit 323 received.)

The Court: All right, next, Mr. Updike.

By Mr. Updike:

Q. Now, Mr. Kirby, with your memory refreshed to the extent of Plaintiff's Exhibit 323, do you recall that you did hear of Joseph Froggatt?

A. No, I don't.

Q. You don't recall it at all?

A. I do not. It wouldn't have meant anything to me. It would just have been another name of an accountant. I don't know why I should retain it for 14 years.

Q. Well now, do you recall, sir, that projections were made with respect to the affairs of IDS covering future years beyond 1949?

A. No, I don't recall. I have testified, I don't know how [fol. 668] many times, that I was pretty much dependent on Mr. Young for my information in regard not only to other things, but particularly to IDS, and he was constantly working and would discuss the important things in IDS with me. These reports, if they were in my files, could very easily have come in the mail, been distributed to Mr. Baugeard or somebody else, and I would never seen see them. If I tried to read all the mail that comes in my office there wouldn't be enough hours in a 24-hour day for me to do it.

Q. I show you, sir, Plaintiff's Exhibit 311 for identification, which also comes from your file, and it is a portion of a letter produced by your counsel, from you, addressed to J. P. Roth, and ask you if you will examine it for a moment, sir.

The Witness: Your Honor, do you want to see this?

The Court: No. What is the question?

Q. Mr. Kirby, doesn't Plaintiff's 311 for identification refresh your recollection that you were deeply interested

and to some extent concerned about Alleghany's acquisition of IDS at that time?

A. Yes, I was, sir, very concerned about it. I have made no statement indicating otherwise. I was very concerned. [fol. 669] In fact, I told Purcell, who brought IDS to Mr. Young's and my attention, to forget it on several occasions, that I did not want the responsibility of dealing with the amount of money that was involved that belonged to other people.

Q. And doesn't it also refresh your recollection that you were not wholly relying on Mr. Young, but you were making quite a careful and independent investigation on your own with respect to IDS?

A. This was prior to the purchase. This is prior to the purchase.

Q. Yes, sir.

A. I certainly wanted to know all about it before I gave my permission for Alleghany to buy the controlling interest in IDS.

Mr. Updike: I offer Plaintiff's Exhibit 311 for identification in evidence.

Mr. Kissam: Objected to.

The Court: What is the relevancy of this on the issue of this case?

Mr. Updike: The relevancy of it, sir, is to attempt to demonstrate that the reason why these documents are in this witness' file is because although his memory may be faulty, he was at that time both before—

[fol. 670] The Court: Objection sustained if that is the reason. That does not make it relevant to the issue in this case. Objection sustained. Next question.

Mr. Updike: I want to show that both before and after acquisition that this witness was studying these documents and became familiar with them.

The Court: Well, he says that he was interested in it before the acquisition. This is a letter before the acquisition asking for some information about it. But you say

that that proves that he studied these other documents. It doesn't prove anything of the kind. Now, let us move on.

Q. Are we to conclude, Mr. Kirby, from your testimony a few minutes ago that once an acquisition was made your interest in IDS's affairs subsided, sir?

A. It certainly did not.

Q. But did it continue to the point where you can recall, whether they came from Mr. Froggatt's office or not, recall receiving reports and studying reports with respect to IDS?

A. I have no recollection of it.

Q. So as you sit there, sir, you have no recollection of studying financial information coming on IDS?

A. I wouldn't say that I never looked at any informa-
[fol. 671] tion regarding IDS. Most of what I got came after the contents had been discussed with Mr. Young.

Q. Now I show you Plaintiff's Exhibit 348 for identification, which also has been produced from your files, and ask you, if you will, to examine it, sir.

The Court: What is the question you are going to ask him so he knows what to examine.

Mr. Updike: The question is whether from that document Mr. Kirby learned of the practice at IDS to make monthly reports which included not only the past history of operations but projections for the future with respect to those operations.

The Court: Do you understand that question?

The Witness: No, I don't, sir.

The Court: Well, I guess the first question is did you see this memorandum 348?

Mr. Updike: It is a report, sir, I think.

The Court: A report.

Mr. Updike: It is a summary of operations.

The Court: For the 12 months ended December 31, 1949. Did you see that?

The Witness: I have no recollection of it, but I wouldn't deny that I may have glanced at it.

Mr. Updike: I offer it in evidence.

[fol. 672] Mr. Kissam: That is objected to, if your Honor please.

The Court: Received in evidence.

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[fol. 673] . Next question, Mr. Updike:

(Plaintiff's Exhibit 348 received.)

By Mr. Updike:

Q. Mr. Kirby, I would like you, if you would, please, to look at Exhibit C to Plaintiff's Exhibit 348 for identification and I would ask you to look particularly, sir, at the right-hand column or group of right-hand columns with the heading across the top 12 months ending December 31st. Do you see that, sir?

A. Yes, I do.

Q. Now, beneath that, the left-hand column of that particular group is headed projected 1949. Do you see that, sir?

A. Yes, sir.

Q. And under projected 1949 there is a series of figures indicating what we claim were the IDS projections.

Now, the next column to the right of that—do you follow me, sir?

[fol. 674] A. Yes, I do.

Q. —shows the actual results for the year, the 12 months ended that date in '49; am I right about that, sir?

A. Well, I see what you are talking about. I don't know whether you're right or not.

Q. Yes. And finally, just to the right of that are the comparable figures for the year 1948. Do you see that, sir?

A. I see some figures there, yes.

Q. Now, Mr. Kirby, didn't you know in 1949 that it was the standard practice of IDS month by month to show the projection figures for the period ending that month and compare those projected figures with the actual performance of IDS against that projection up to that time?

A. Why, I probably knew something about it, but I don't think that I made any study of it.

[fol. 675] Q. But you did know that that was the way in which they kept some of their reports, am I right about that?

Mr. Whittlesey: I object to that.

A. No.

Q. Looking at the particular report that you have before you—

A. It doesn't have any date on this paper, except the headings for the different years.

Q. With respect to the date, if you turn to the cover page of the exhibit and follow me, at the very top of the cover page you will see that it says "Summary of operations for the 12 months ending December 31, 1949."

A. Yes, sir. That may or may not have anything to do with the pages you are talking about.

Q. This is all part of a single exhibit.

The Court: What is the question, Mr. Updike?

Mr. Updike: Whether the witness knew this was the practice of IDS.

The Court: It is not unusual to compare those, is it?

Mr. Updike: No.

A. I assume it was done. Things were in pretty bad [fol. 676] shape at the time, but I assume they did it.

Q. As a matter of fact, didn't you in September of 1949 order that these very reports, these monthly summaries of operations be sent to you?

Mr. McDonald: I am going to object.

The Court: Overruled.

Mr. McDonald: We are not trying the merits.

The Court: Overruled.

A. I cannot remember whether I ordered it or did not order it. I doubt very much if I did, although I would not say that I did not if you have evidence to the contrary.

Q. I show you Plaintiff's Exhibit 336 for identification and ask you if you will please read it to yourself.

A. The answer is the same as it has been.

Q. I haven't asked you a question yet.

The Court: Ask him a question.

Mr. Updike: I want to show him another document.

Q. I would like you now, sir, to look at Plaintiff's Exhibit 335 for identification, which has been produced by [fol. 677] your counsel from your files, and it shows in the lower lefthand corner a carbon copy to Mr. Kirby. Will you please read that to yourself, sir.

(Pause.)

Q. Don't you recall, Mr. Kirby, that Mr. Shipman was asked by Mr. Young and yourself to get copies of reports from IDS for your use and Mr. Young's use?

A. No, I don't recall it.

Q. Would you say that it did not happen?

Mr. McDonald: Objection.

The Court: Overruled.

A. I wouldn't say it did not happen, no.

The Court: Let us ask whether it did happen.

Mr. Updike: I would like to show him one more exhibit.

The Court: Do you recall whether he did get reports from you, Mr. Kirby?

The Witness: I don't recall that, but I know Mr. Shipman was studying IDS continuously under Mr. Young's orders at that time. I tried to make it plain that while these reports could have come into my office and been analyzed by Mr. Baugeard, I never saw them. I depended on Mr. [fol. 678] Young to keep me advised in short sentences of what the situation was after we were once in.

Q. Mr. Kirby, I show you Plaintiff's Exhibit 257, which has been produced by the IDS files and it purports to be the original of a letter from Mr. Shipman to Mr. Waag, in which Mr. Shipman is asking for certain reports on your behalf, and I ask you if you received the reports shown by that letter.

A. I haven't the faintest idea.

Q. Would you state that you did not receive them, Mr. Kirby?

A. No, sir, I would not state I did receiving anything pertaining to IDS that evidence shows was mailed to my office.

Mr. Updike: I offer those three documents in evidence, sir.

Mr. Kissam: Objection.

Mr. Whittlesey: Objection.

The Court: Why not get right to the point.

What do you say it is that Mr. Kirby concealed from the referee in the settlement of these suits?

Mr. Updike: For one thing, Mr. Kirby and his co-de- [fol. 679] fendants to the extent they were co-represented did not produce for the referee among other things the very documents that your Honor has got in his hand, which shows the flow of documents from IDS to Alleghany.

The Court: Wait a minute, the flow of documents was not in issue before the referee. A particular document may have been in issue. What particular things did Mr. Kirby conceal from the referee?

Mr. Updike: I offer the summary of operations reports for the month ending January 31, 1950, and the month ending February 28, 1950, and the month ending March 31, 1950, which have been marked respectively Plaintiff's Exhibits 240, 241 and 242 for identification.

The Court: You say those are the things that were not submitted to the referee?

Mr. Updike: There isn't a single projection that ever appeared before Referee Fitzsimmons with respect to the liability of this witness under the 1950 IDS transaction.

The Court: No projection of his liability?

Mr. Updike: No projection of the earnings of IDS. Mr. [fol. 680] Graubard, you may recall, identified, and it is is now in evidence, a projection for the year 1950 which showed that IDS was expected to earn something over $20

a share. It bears a date in early April 1950. It was available to this witness before he signed the proxy material that went out to the Alleghany shareholders, and it shows that where he was about to acquire stock of IDS for $8.15 a share, the projection before him showed that the stock was going to earn 20 or more dollars per share.

Mr. Whittlesey: Mr. Updike is making a great many statements, your Honor.

The Court: I am trying to find out what he is driving at.

Mr. Whittlesey: But it is no proof.

The Court: It isn't proof, but I am asking him what he is driving at so I can assay the relevancy of these documents. The particular documents you say he should have produced are these particular documents?

Mr. Updike: These three particular documents.

The Court: What other documents do you say he did not reveal to the referee that he should have? Let us get [fol. 681] all of them. Then we will go to the next point.

Mr. Updike: The documents identified by Mr. Graubard as Plaintiff's Exhibit 246, and Plaintiff's Exhibit 245 for identification which shows not only the projection for the year 1950 but the projections for the years 1951, 1952 and 1953.

The Court: This document Exhibit 245 for identification is a projected net income statement for the years 1950 through 1954. You say Mr. Kirby had that at the time of the referee's hearing and did not produce it for the referee?

Mr. Updike: I do not say he had that, because this did not come from Mr. Kirby's files, but I say this was at Alleghany at that time, I say it was available at IDS, and I say that this witness knew of the practice of IDS of preparing projections for the future, and that practice is reflected by that exhibit as well as by the Froggatt report.

The Court: What is it he concealed?

Mr. Updike: He concealed information that was known to him or available to him as chief executive which bore on the fairness of the transaction that was before the referee for adjudication.

[fol. 682] The Court: Now, if you want to offer some documents in evidence, let us get the documents that he should have produced before the referee. I am a little concerned as to which ones they are. Give them to me and let me see what they are.

Mr. Updike: I offer—

The Court: You have submitted Exhibits 240 for identification, 241 for identification, 242 for identification, 348 for identification, and 245 for identification. Those are the documents—

Mr. Updike: Exhibit 246 for identification as well, sir. That was the one which was identified on the examination of Mr. Graubard.

The Court: Those are the documents you say Mr. Kirby should have revealed to the referee?

Mr. Updike: Yes.

The Court: We now know what the documents are. Now your problem is to prove that Mr. Kirby knew of the facts contained therein. We have these marked for identification. Why not take up the next step.

How do we establish that Mr. Kirby knew of these facts? It seems to me that a little bit of clever examination might [fol. 683] not identify the documents but might certainly identify what Mr. Kirby knew about them.

Mr. Updike: I first wish to establish, and I believe I now have, that Mr. Kirby knew of the existence of the practice at IDS of making projections.

The Court: He says he may well have known it.

Mr. Updike: Yes. I would establish by reference to the three monthly reports, Exhibits 240, 241 and 242, all for identification, that those are merely the reports in sequence—

The Court: How do you prove that Mr. Kirby saw them or knew of them?

Mr. Updike: I will ask Mr. Kirby.

The Court: Do that.

Q. With respect to Plaintiff's Exhibits 240, Mr. Kirby do you recall seeing that in the peroid following the plain-

tiff's exhibit that covered the figures for the 12 months ending December 31, 1949?

A. I have no recollection of it.

Q. Would you deny that you saw it?

A. No.

Mr. Updike: I offer it in evidence.

[fol. 684] Mr. Kissam: Objection.

The Court: That is sort of a backhanded way of getting a document in evidence. He does not deny receiving it, therefore you offer it in evidence.

Mr. Updike: He does not deny receiving them.

The Court: But is that a way to put it in evidence?

Mr. Updike: I have produced exhibits where Mr. Kirby asked Mr. Shipman to have reports sent to him.

The Witness: I asked him not to send me a lot of reports.

By the Court:

Q. You and Aleghany Corporation were very much interested in your investment in Investors Diversified?

A. Yes.

Q. As a director of Alleghany you felt you had a responsibility to see what the money was being used for?

A. Yes.

Q. And as such I presume you wanted to know how Investors Diversified was coming along, whether it was [fol. 685] making money or losing money?

A. Yes, sir.

Q. Because of that, you undoubtedly, through your subordinates, got reports?

A. In a nutshell, in a nutshell.

Q. And you knew it was doing very well?

A. Yes.

Q. And you knew it was a good investment for Alleghany?

A. In time, I did.

Q. How about at the beginning?

A. Oh, no, I thought it was a terrible investment in the beginning.

Q. Why did you think it was a terrible investment?

A. Because there were $550 million in contracts that were coming due in 1953 and 1954 and 1955, along in there, and there wasn't any indication where the money was going to come from to pay for them.

Q. Did you have these projections to show where the money was coming from to pay for them?

A. I think not at the time. If it hadn't been for the Korean War and some very profitable real estate deals that were made in 1949 that helped tremendously, I think [fol. 686] the company could have gone bankrupt in the three or four years up to the time that the situation improved to such an extent that with careful management we might be able to bail ourselves out.

Q. Do you know how much Investors Diversified was earning per share in those years?

A. I don't think it was a great amount, I cannot recall now. It took a rise just shortly after we got in, but it was because of a lot of work that was done by the management realizing the situation and making some deals that turned out exceptionally well.

Q. The earnings of Investors Diversified came into Alleghany Corporation, I presume?

A. The dividends on the stock that Aleghany owned, yes, sir.

Q. Do you know what those dividends were per share?

A. I cannot recall. There were no dividends, as I recall, for some years.

Q. How much of the earnings were paid in dividends?

A. As I recall, until recently, they kept it on a fifty-fifty basis.

Q. In 1949, do you know how much the earnings of In- [fol. 687] vestors Diversified were generally?

A. My recollection is that there weren't any earnings in 1949, but that is so far back—

Q. That was a year after you got control?

A. It was a very drab picture, there isn't any question about that, and I cannot recall that there were any earnings at all in 1949.

Q. How about 1950?

A. I don't think there were then, although things were on the upgrade, as I said, as a result of some very excellent real estate transactions, then there were some earnings in 1949 that we had not anticipated in 1948. As I remember it, we did not expect—Mr. Young wrote me a letter in which he said we fortunately might be able to get IDS on a sound basis on 1960. It turned out to be much more favorable than that. We got to where we felt we were entirely out of the woods. I just never did have very much confidence in IDS until about 1953 or 1954, when I saw things were improving, when it looked as though we might be saved.

Q. If you didn't have confidence in it, why did you make that exchange of stock?

A. It was only one of many exchanges that I made, sir. [fol. 688] Mr. Young and I had set a policy of reducing Alleghany's debt as far as we could, and by making these exchanges of not only IDS but many other securities that were in the portfolio we were able to reduce it.

Q. You were able to reduce—

A. The capitalization. It was wiping out preferred stocks.

Q. You were exchanging stock of Alleghany for stock of IDS?

A. Yes, sir, preferred stock?

Q. You did that because you wanted to reduce the capitalization of Alleghany?

A. Yes. We knew we would probably never benefit from Alleghany until we got the preferred stock down substantially. We even had to put out an issue of preferred stock to take care of the dividends that had accumulated on a prior issue of preferred stock. So you can see—

Q. So you had some of this preferred stock?

A. Yes.

Q. You exchanged it for IDS?

A. Yes.

Q. Although you thought IDS wasn't very good?

[fol. 689] A. That's right. I did not think Alleghany was very good either. I thought it was very poor, it was one of many things we were trying to work out. I couldn't see where I was hurting myself any or probably not benefiting myself any, by making these exchanges, I was only accomplishing what we set out to accomplish, and that was to reduce the debt of Alleghany in whatever way we might be able to do it.

* * * * * * *

[fol. 690] By Mr. Updike:

Q. Mr. Kirby, do you recall, even if you didn't read the reports, discussing with Mr. Young the information that came to him to the effect that IDS was going to meet these securities as they fell due?

Mr. Kissam: He is assuming a fact not in evidence.
The Court: Answer the question.

A. That I recall discussing with Mr. Young?

Q. You told his Honor that one of your concerns about IDS was its ability to meet these securities which were coming through in future years, do you recall telling his [fol. 691] Honor that?

A. Indeed I do.

Q. Didn't Mr. Young tell you that there were reports coming to IDS that he had seen which showed how IDS was going to meet these maturities and that there was no basis for anxiety?

A. Do I recall discussing that with Mr. Young? I don't.

Q. Do you want us to understand that you did not raise this issue with Mr. Young?

A. I did not say I hadn't discussed it with him. I said I didn't recall it.

Mr. McDonald: I would object to that.
The Court: Object to his lack of recollection?
Mr. McDonald: No.
The Court: Then what you are objecting to?
Mr. McDonald: I will let it go.

Q. Mr. Kirby, isn't it accurate to say, sir, that these summary reports, let us say Plaintiff's Exhibits 240, 241 and 242, you are testifying now merely to a non-recollection of receiving these reports, and you do not tell his Honor that you did not receive the reports, am I correct about that?

[fol. 692] A. I certainly do not deny that those reports did not come into my office.

Q. How about actually seeing them, sir, yourself, would you deny that you had seen them?

A. No, I don't think I would deny that, although I have no recollection of it.

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[fol. 693] Q. Mr. Kirby, you will recall, sir, when we reviewed the information contained in the summary of earnings for the period ending December 31, I asked you to follow me as we looked at certain columns of figures that appeared in one of the exhibits, do you remember that?

A. I do.

[fol. 694] Q. My question to you now is with respect to reports for the three succeeding monthly periods, January, February and March of 1950. I ask you whether you discussed the information in those reports with Mr. Baugeard?

A. I haven't the faintest idea.

Q. Would you deny that you had done so, sir?

• • • • • • •

A. I have no recollection of discussing it with him.

Q. Did you discuss any projected earnings information affecting IDS with Mr. Baugeard during that period?

A. I have no recollection of it, no.

Q. Did you discuss it with Mr. Young?

A. I have testified that I was constantly discussing IDS with Mr. Young whenever there was anything to discuss.

[fol. 695] Q. My question is more specific than that, my question is as to whether you discussed with Mr. Young information about projected future earnings of IDS?

A. I cannot recall that.

The Court: You may or you may not have?
The Witness: Yes.

Q. But you deny you did?
The Court: I advanced you a little bit, don't retreat, move on.
Q. With respect to Mr. Purcell, do you, first of all,—first, who was Mr. Purcell?
A. Mr. Purcell was vice-chairman of the board of Alleghany. He was house counsel, I guess, you would call him. He was the man that brought IDS to Alleghany, and it was part of his job to look for possible good investments for Alleghany.
[fol. 696] Q. And specifically the IDS possible acquisition was one of those that came to Mr. Purcell in the fall of 1948, is that right?
A. Yes.
Q. Now, after the acquisition by Alleghany of IDS did Mr. Purcell go to Minneapolis and spend weeks and perhaps months of time out there on that operation?
A. He spent some time out there. I don't know what he was doing.
Q. Well, sir, wasn't he made a director of IDS by Alleghany?
A. I wouldn't be a bit surprised.
Q. And Mr. Anzalone as well?
A. If Mr. Anzalone was made a director I don't recall it, although he may have been.
Q. Well, I believe that is what the record shows. And finally Mr. H.J. Guild, did you know—
A. Henry Guild, yes, he was on the board of Alleghany at one time.
Q. And was he not also put on the board of IDS?
A. He could have been, but I don't remember it.
Q. Now, did you discuss in the fall of 1949 with Mr. Purcell the projections of IDS with respect to its future [fol. 697] earnings?

Mr. Whittlesey: I object to that.
The Court: Overruled. He may answer.

A. As you stated a minute ago, Mr. Purcell went to Minneapolis and he was in Minneapolis, I think, most of his time. He would come East, discuss things with Mr. Young while I was busy in my own Morristown office on other things besides IDS, many other things besides IDS, and I would get a summary of a report from Mr. Young of what came from Mr. Shipman and Mr. Purcell and possibly Mr. Guild who took a less active part in the affairs, as I remember it. I didn't even remember that he was on the board until you mentioned it.

Q. Now, sir, with respect to the summary of the IDS affairs, don't you recall that forward projections were part of those summaries?

A. No, I don't, sir.

Q. Well now, I show you Plaintiff's Exhibit 345 for identification, a document produced by your counsel from your file, which is a copy of a letter addressed to both Mr. Young and to you, and ask you if you can recall receiving that letter?

Mr. Updike: Your Honor, this is the document that was marked before the referee in Zenn, but it has bearing on [fol. 698] this witness' knowledge of projected future earnings.

The Court: All right, the witness is asked a question. He can answer it.

A. I recall seeing this letter some time in the past few weeks for the first time. I wouldn't recall it if I hadn't seen it in the past few weeks.

Q. Do I understand your testimony to be that you saw that letter, which was addressed to you and to Mr. Young, for the first time in the last few weeks?

A. I didn't say anything that sounded like that.

Mr. Whittlesey: He didn't say that.

Q. I misunderstood your answer to that.

A. You certainly did.

The Court: Take it easy. Just answer the question.

Mr. Updike: May I have his answer read? Did I misunderstand it? I guess it isn't worth spending time on it.

The Court: No, he says he remembers the letter, he saw it in the last few weeks. Now you haven't yet asked him whether he saw it around the time of the date.

Q. Now, did you receive it at or about the date that it bears?

[fol. 699] A. I have no recollection of it.

Q. Don't you recall, sir, that that letter came at a time when you were considering tendering your Alleghany stock for the IDS Class A shares that are involved in this 1950 IDS transaction?

Mr. Whittlesey: I object to that as argumentative, your Honor.

The Court: Overruled.

A. No, I do not have any recollection of that kind.

The Court: Let me look at the letter.

Mr. Whittlesey: Now, if your Honor please—

Mr. Updike: I direct your Honor's attention particularly to the first full paragraph on page 3, sir.

The Court: What about it?

Mr. Updike: This is part of the reason why I showed this to the witness. It shows that in February of 1950 Mr. Purcell is reporting to the witness that the mortgage department operations alone—the mortgage department operations, from other exhibits, lost money in 1948—and it made, the figures show, at the end, in that other exhibit, maybe a million and a half in 1949. Here is a prediction that is going to make $4,487,000 in 1955 before the allocation of home office expense.

[fol. 700] The Court: What paragraph is that?

Mr. Updike: First full paragraph on page 3, sir.

The Court: All right, now, was this introduced before the referee in the Zenn v. Anzalone?

Mr. Updike: This document was, but my purpose in showing it to the witness is merely to bring his mind back to the projection materials that were coming to him from Mr. Purcell.

* * * * * * *

[fol. 701] The Court: Well, you have proved that these documents were in his possession 14 years ago.

Mr. Updike: Yes, sir.

The Court: Is that admitted, Mr. Whittlesey, that these documents which have been produced from his files—

Mr. Whittlesey: No, because he is talking with regard to so many documents right now. If we are dealing with one other time I could admit as to some and not as to others. I would have a great deal to say as to all of them, whether they were in his possession or not. For example, one here, [fol. 702] your Honor, clearly was in his possession and clearly went back to Alleghany. Now, how, under the charge in this case, did he fail to adduce facts? How can he be charged with failing to adduce something which went back into the Alleghany files. That is one document.

Mr. Updike: He was the president of Alleghany.

Mr. Whittlesey: These documents, these projections which Mr. Updike has been waving around here for a long time, there is no proof that they were ever in the Alleghany files, no proof that they were ever in Mr. Kirby's files, and Mr. Updike himself only got them by going out and taking depositions in March of this year at IDS.

* * * * * * *

[fol. 703] The Court: Mr. Whittlesey, were they in the files of Mr. Kirby at the time of the exchange transaction?

Mr. Whittlesey: If Mr. Updike would address my attention to a particular one I will answer them the best I can one at a time.

The Court: Give him the number.

Mr. Updike: Number 348 is the first one.

The Court: 348. That is this document here.

Mr. Updike: Yes, sir.

Mr. Whittlesey: As to 348, I can stipulate that in re-[fol. 704] sponding to the plaintiff's interrogatories that particular document was found by us in Mr. Kirby's files. We responded, I believe, in January of this year.

The Court: And was it in his files in 1949?

Mr. Whittlesey: I cannot tell, your Honor. No knowledge.

The Court: All right. Now, what is the next document?

Mr. Updike: The next number is 331.

The Court: Was that in Mr. Kirby's files in 1949?

Mr. Whittlesey: Again I can only stipulate that we found that in his files when we answered the interrogatories in January of this year.

The Court: You don't know whether it was there in 1949?

Mr. Whittlesey: I certainly have no knowledge myself on that, no.

The Court: All right, you don't concede.

What is the next one?

Mr. Updike: 335.

The Court: Is the answer the same as to that?

Mr. Whittlesey: My answer to that would have to be the same, your Honor.

[fol. 705] The Court: All right. What is the next one?

Mr. Updike: Well, those are the ones from the witness' own files.

The Court: Are there any other documents that you are interested in?

Mr. Updike: Although they did not come from his files, the documents which have been identified as 240, 241 and 242, and the documents identified as 245 and 246 for identification; I think it is proved by the record that this material came to Mr.—

The Court: Well, let's forget the speech, Mr. Updike. Were they in Mr. Kirby's files, Mr. Whittlesey, these documents?

Mr. Whittlesey: 240, 241 and 242 were not found in Mr. Kirby's files when we searched them in response to the plaintiff's interrogatories. 245 and 246, which I believe I have once before stated, were not in Mr. Kirby's files. The testimony before the referee was that they were not ever in Alleghany's files. They were found in March of this year on depositions taken in Minneapolis out in the IDS files for the first time so far as I am aware.

The Court: Well, then, there is no indication that they were in Mr. Kirby's files. You therefore have—

[fol. 706] Mr. Updike: May I have a concession with respect to 351?

Mr. Whittlesey: As to 351, which is the letter addressed to Mr. Kirby under date of May 22nd, 1950, I will stipulate that the letter and the enclosure attached to it, which bears date of April 25, 1950, were found in his files when we responded to the plaintiff's interrogatories.

The Court: Were they in his files at the time of the letter, do you know? Can you stipulate?

Mr. Whittlesey: I would have no way of telling myself, your Honor, no.

The Court: All right. Does that cover all the documents, Mr. Updike?

Mr. Updike: That covers all the documents and I remind your Honor—

The Court: Well, you have certain documents which they say were in Mr. Kirby's files and they do not know whether they were in his files in 1949, 1950. Now, there is one other thing that interests me about this. As I recall Mr. Graubard's testimony, when he testified last week, he said that Mr. Kirby's files were opened up to the dissident stockholders for examination.

Mr. Updike: I do not believe so, sir.

[fol. 707] The Court: Is that right?

Mr. Whittlesey: No, your Honor.

Mr. Updike: I did not so understand.

The Court: Which files were opened up, Alleghany?

Mr. Whittlesey: The entire Alleghany files were opened to all the attorneys in the Zenn case.

The Court: And that did not include Mr. Kirby's personal files.

Mr. Whittlesey: And also Mr. Robert Young's files, who was one of the directors of Alleghany, and also Mr. Robert Purcell's files, a director of Alleghany.

The Court: Not Mr. Kirby's files?

Mr. Whittlesey: Mr. Kirby's files were not subpoenaed in court.

The Court: Anything in Alleghany's files were obviously available for examination by the dissenting stockholders.

Mr. Whittlesey: No question about that.

Mr. Updike: I think the record shows there, sir, that—

The Court: There isn't any record about it. Let's go on. What is the next thing? Are you offering these in evidence or not on this incomplete testimony?

[fol. 708] Mr. Updike: I offer these in evidence, accompanied by Plaintiff's 257 and 336, which completes a chain of correspondence, as we contend, showing the request from Mr. Shipman to IDS to send reports on in September of 1949, the answer from IDS, which does come from the witness' files, asking which reports Mr. Kirby and Mr. Young want, and the response from Mr. Shipman at Alleghany.

The Court: Let me see this correspondence.

Mr. Updike: Yes, sir.

The Court: Well, I will take in evidence Exhibit 257, 335 and 336 for identification. Those are received in evidence. That is the correspondence.

(Plaintiff's Exhibits 257, 335 and 336 received.)

The Court: The other documents, there has been no proof that they were in Mr. Kirby's files, and I cannot receive them in evidence on that incomplete proof.

Mr. Updike: Is your Honor, in making this ruling, relying on a statement that Alleghany's files were opened up before the referee?

The Court: That is another matter. You haven't proved that these documents that you are referring to, other than the correspondence, were in Mr. Kirby's files. It seems to [fol. 709] me that in the two years that you have had this case in preparation you could have done better than that.

Mr. Updike: They have been produced by his counsel from his files.

The Court: There is no doubt they were in his files this past year. There is no evidence that they were in his

files in 1949, 1950, and it is your burden to establish it. You haven't done it, Mr. Updike.

What is the next question?

Mr. Updike: May I ask the witness a question?

The Court: Sure.

By Mr. Updike:

Q. Mr. Kirby, are you familiar with your filing system in Morristown?

A. Moderately.

Q. Are you sufficiently familiar with that system to know whether in the regular course, if you receive a letter with respect to a particular subject matter and it isn't discarded or thrown out for some reason, it is filed at or about the time that it is received?

A. Well, if it isn't thrown out, it is obviously filed.

Q. And is it filed at or about the time that it is received, [fol. 710] sir?

A. That I wouldn't recall, whether these papers were passed around. It is even possible that they went into New York for discussion when I was there, in the Alleghany office.

Q. But in regular course, sir, does Mr. Baugeard do the filing for you, sir?

A. No, he does not,

Q. Do you have a young lady there, a secretary, who attends to that?

A. Yes.

Q. And isn't it your experience that when you send for a file in search of correspondence on a particular subject matter that you find the correspondence in the file, sir?

A. I don't find it. She finds it. When I try to find it I'm not very successful, as a rule.

[fol. 711] Q. Do you dispute, sir, that these documents that you said you don't recall, do you dispute that they were in your files in 1949 and 1950 at or about the date that they bear?

Mr. Kissam: Objected to.

The Court: Objection overruled. Let him answer.

A. I don't dispute it, I don't know.

Mr. Updike: I submit they are admissible.

The Court: They are not admissible on that. • • •

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[fol. 712] Mr. Updike: Finally, I offer the last piece of correspondence, which is Exhibit 351.

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[fol. 713] Q. Mr. Kirby, I show you Plaintiff's Exhibit 351 for identification, which purports to be the original of a letter to you from Mr. Crabb at IDS.

First of all, do you remember who Mr. Crabb was?

A. Yes, sir.

Q. He was the president of IDS at that time, was he not?

A. He was.

Q. Will you please tell his Honor whether that came to you at or about the date it bears?

A. I didn't hear that question.

Q. Will you tell his Honor whether that document together with the enclosure attached to it came to you at or about the date it bears?

A. I haven't the faintest idea.

The Court: Mr. Whittlesey, this was produced from Mr. Kirby's files?

Mr. Whittlesey: Yes, it was, your Honor.

The Court: Do you recall the situation at all?

The Witness: No, sir, I do not.

The Court: Did you have any correspondence with Mr. Crabb about the time you got control of IDS?

[fol. 714] The Witness: I don't think I did.

Mr. Updike: This is about a year later.

The Witness: I don't think I did. I know I saw him on two or three occasions, I don't recall having received any correspondence from him.

The Court: Did you discuss with him the results of the mortgage operations for 1950?

The Witness: I don't think that I saw him. I am not positive, but I don't think I ever saw him after Alleghany made the acquisition of IDS. He came into the Alleghany office at our request to talk about it, to tell us, and answer questions prior to making the investment, but I don't recall seeing him after that.

The Court: Where did you get the impression then that the mortgage operation showed a very great profit?

The Witness: Where did I get it?

The Court: Yes.

The Witness: I had that in mind after conversations that took place at different times with Mr. Young.

The Court: Did any conversations with Mr. Crabb give you the same results?

[fol. 715] The Witness: I don't think I had any conversations with Mr. Crabb as late as that.

Mr. Updike: May I draw his attention to the second paragraph of the letter in which Mr. Crabb refers to the fact that "It was a real pleasure to see you," meaning Mr. Kirby, "last week."

A. This is in May. I would not dispute that it was true I saw him as late as that, but I wouldn't think I saw him that late.

The Court: This is a letter which comes from your files, and I will presume that the letter in your files was received at about that time. I will receive Exhibit 351 for identification in evidence.

(Plaintiff's Exhibit 351 for identification received in evidence.)

Mr. Whittlesey: I hope it is not too late to note an objection. The charge in the complaint here is that Mr. Kirby failed to produce facts known to him of the exchange transaction. This shows that whatever information he got at that time came to him three weeks after the exchange transaction.

The Court: That is something that certainly goes to the weight of it in proving the case.

Mr. Whittlesey: It goes to the relevancy.

[fol. 716] The Court: But it does not go to the admissibility. I will take it.

Mr. Updike: While we are on that subject, I draw your Honor's attention to the fact that the information which appears in the enclosures to this letter, while the letter is dated May 1950, much of the information appears in Plaintiff's Exhibit 345 for identification, which was addressed to the witness and in which he acknowledged that he had received it at or about that time. That is dated in February 1950.

* * * * * * *

[fol. 716a] Cross examination.

By Mr. Whittlesey:

Q. Mr. Kirby, were you at any time an officer or a director of IDS?

[fol. 716b] A. No, sir.

Mr. Kissam: May I have a minute, your Honor?

The Court: Yes.

Mr. Kissam: I would just like to ask one question, your Honor.

Cross examination.

By Mr. Kissam:

Q. Mr. Kirby, under the bylaws of Alleghany in the period 1949, 1950 and even 1955, who was the chief executive officer of the corporation?

A. The chairman, Mr. Young.

Q. Is it a fact that the office of president which you occupied by arrangement between you and Mr. Young did not give the president the ordinary corporate responsibility,

that responsibility was in Mr. Young's hand as the chairman?

A. That is correct.

. . . . . .

[fol. 716c] Is that all for Mr. Kirby?

Mr. Updike: Just to complete my record, sir, on the basis not that they came from this witness but on the basis that as president of Alleghany, occupying the relationship that he did, it was his duty to know about the contents of these documents. I offer Exhibits 240, 241 and 242, all for identification.

The Court: Those are the documents from the files of the Alleghany Corporation?

Mr. Updike: These are documents from the files of IDS which the correspondence you have admitted show were also in the files of Alleghany Corporation.

The Court: I don't think the correspondence showed that they were necessarily in the files of Alleghany Corporation.

[fol. 716d] Mr. Kissam: These are the very ones you rejected a few minutes ago.

Mr. Updike: I wanted to make my record clear.

The Court: I refuse to admit those on the present state of the record.

Mr. Updike: I reoffer Exhibit 220, the Froggatt report, and Exhibits 245 and 246 which are the projections.

The Court: Were those from the files of Alleghany Corporation?

Mr. Updike: At the time or about the time they came out, yes.

The Court: Then it seems to me this is futile, because Mr. Graubard said the files of Alleghany Corporation were opened up and they got all the papers.

Mr. Updike: It is perfectly clear he did not get these papers from Alleghany or any other source.

The Court: If they were there and the files were opened for his inspection, if there was anything in them, he had a right to look for them.

[fol. 716e] Mr. Updike: He clearly had a right to look at them, if they were open to him, and if they were then there.

The Court: Well, you say they were there.

Mr. Updike: I say that they came in there, in the regular course of business, at that time, sir.

The Court: Well, it seems to me you are caught in a dilemma there. If they were there, then Mr. Graubard had a right to look at them. If they weren't there, then the witness is responsible for—

Mr. Updike: I assert he had the right to look at them. I assert he was not given them.

Mr. Kissam: Now we have Mr. Updike testifying.

The Court: Mr. Graubard said he was given the right to examine anything in the file. You say they were in the file. I will not receive them in evidence.

Any further questions to this witness?

Mr. Updike: No, sir.

The Court: All right.

* * * * * * *

[fol. 717] Randolph Phillips being first duly affirmed, testified as follows:

Direct examination.

By Mr. Carter:

Q. You are the Randolph Phillips who are the defendant in the instant action, are you not?

A. Yes.

Q. In the calendar year 1954, were you employed in the Alleghany complex?

A. Yes.

* * * * * * *

[fol. 718] Q. Now, in connection with your financial consultantship to Mr. Brussel in the Breswick-Briggs matter, did you have a written understanding with him with respect to your fees?

A. Only insofar as one of those letters reflects. I think you have introduced one dated February 3, 1955, that reflects that.

Q. Well, without going into too much detail, can we agree, (a) that you were retained by Mr. George Brussel, Jr. as a financial consultant in connection with the prosecution of that litigation?

A. Yes, sir.

Q. And can we further agree that you expected to be compensated for the services you rendered Mr. Brussel in that connection?

A. In the event we were successful.

Q. Yes.

A. Yes, sir.

* * * * * * *

[fol. 719] Q. In any event, some time after this $700,000 settlement that we mentioned a moment ago became a matter within the ambit of your knowledge did you initiate one or more conversations with Mr. Graubard seeking to have Samuel Rosen participate in the Zenn-Anzalone litiga-
[fol. 720] tion as an objectant?

A. No, sir, but to cut through, it was the other way around, I believe. Mr. Graubard called me, spoke to me about it.

Q. In other words, Mr. Graubard made the first call to you rather than you having made the first call to Mr. Graubard?

A. My recollection, Mr. Carter, whether it was by telephone or by meeting, was that Mr. Graubard stated that he thought Mr. Rosen and himself might be interested in intervening as objectant in the State Court to the then-$700,000 settlement.

Q. All right. In any event, I take it that some time thereafter you entered into an arrangement with Mr. Graubard whereby you would become his financial consultant in connection with the objectant Rosen's intervention in the lawsuit, did you not?

A. Yes, sir, with the consent and approval of Mr. Brussel.

* * * * * * *

[fol. 721] Q. Did you, with Mr. Graubard, exert efforts to have Mr. Kirby testify before Referee Fitzsimmons?

A. Well, I did not exert any efforts at all. Mr. Graubard had an associate professor of cardiology at New York University testify. This doctor was a physician for Mr. Graubard and a friend of his, and I was simply present and interested.

Q. And did you approve of the actions that Mr. Graubard would take, or was taking in connection with an attempt to get Mr. Kirby to testify?

A. Well, my approval was never sought, but I would say it was implicit if I had been asked.

* * * * * * *

[fol. 722] Q. When did you learn, Mr. Phillips, of Judge Dimock's decision?

A. Well, I assume within either hours or a day thereafter it had been filed. You are referring, of course, to the September 22, 1959, decision.

Q. That's right.

A. Yes, sir.

Q. Thereafter did you call Mr. Ireland?

A. I believe so.

Q. Do you have any idea of the date in relation to the date of decision which was September 22nd?

A. It was within a matter of hours after I had read the [fol. 723] decision, I am sure, Mr. Carter, but I don't have any distinct recollection about the date.

Q. Now, did you consider that decision of Judge Dimock's a major victory for the cause that you represented?

A. Well, without characterizing, I considered it very refreshing.

* * * * * * *

[fol. 724] Q. By the way, I don't want to depart from the subject, because I think we are getting to something that is of extreme importance and the Court will be greatly interested in, before we get to it, when did Carl Bresnick die?

A. Carl Bresnick died I believe within a day or day after Judge Dimock's decision of September 22, 1959. I think it was September 24th.

Q. In fact, from that point on, so far as you and Mr. Brussel were concerned, you were without a client to prosecute Breswick v. Briggs litigation, were you not?

A. Your question has about two gun barrels looking at me, Mr. Carter. If I might take one at a time.

[fol. 725] Q. Please do.

A. Mr. Neisloss, Mr. Bresnick and Clarence W. Bailey were the three Breswick plaintiffs. Mr. Bresnick was responsible for my original retainer. In August, 1958, his only son had died in an airplane crash at Nantucket. Mr. Bresnick was not in good mental health thereafter. I learned at some time after his death that he had sold out a whole bundle of securities, including his Alleghany shares. However, Mr. Brussel told me that until there was actual court proceedings, such as the taking of evidence on remand, he did not believe he was under any professional obligation to disclose that fact.

Secondly, Mr. Neisloss, although he had canceled on October 6th, 1959 my power and his authorized attorney in fact, because he did not want to be obligated in view of Mr. Bresnick's death of any disbursements, to have any responsibility along that line, Mr. Neisloss was still a stockholder in good standing and Mr. Brussel was directed by Mr. Neisloss' personal attorney to continue with the lawsuit to the extent of trying to negotiate a settlement. Therefore, I felt that whatever my capacity was, whether it was one that could be legally construed at this time or not, [fol. 726] I would use my best effort to bring this rather leaking ship safely into port.

Q. It was leaking, wasn't it?

A. Well, it was leaking worse than Mr. Kirby knew, fortunately.

Q. I show you—

A. Fortunately, I mean, he didn't know it was leaking.

[fol. 727] Q. In October or November of 1959, did you ask Mr. Graubard for a professional opinion with respect to the legality of one joint tort feasor settling his liability as distinct from his co-defendants?

A. In November, 1959, I recall the question was raised by Mr. Ireland as to whether Mr. Graubard and Mr. Brussel thought it would be possible to make a separate settlement for Mr. Kirby. I referred that question to both of them. Mr. Graubard's office undertook to prepare a memorandum on the subject. I would like to correct a statement in my deposition, there is a letter by me dated November 20, 1959, forwarding that opinion of Mr. Graubard to Mr. Ireland.

* * * * * * *

[fol. 728] Q. Does that mean Mr. Ireland told you he was going to succeed Mr. Wallace as vice president?

A. Quite the contrary, that refers to the evidence that we thought was so significant that had not been put before the State Court. That was the evidence I referred to yesterday, that when Mr. Young testified in Young v. Ebbott, he had testified truthfully under examination by then attorney Henry Friendly that there was an unconditional put by Alleghany Corporation to Clint Murchison, Sr. However, Mr. Pomerantz never discovered that testimony and when Mr. Young was deposed a year later in Zenn v. Anzalone by Mr. Pomerantz, Mr. Young under oath [fol. 729] stated he had never seen the put agreement, that it was not unconditional—I am giving it in substance—and that the agreement was drawn up by his green staff at that time. I had read that testimony. I informed Mr. Graubard of both the Young v. Ebbott testimony and the Zenn v. Anzalone testimony. There came a time when Mr. Young was put on the stand in Zenn v. Anzalone where he adhered to his later testimony and was not confronted with the Young v. Ebbott testimony.

* * * * * * *

[fol. 730] Q. Now, of course, did Mr. Ireland at any time ever tell you he had any authority from the Young estate to make an offer or a suggestion to you along the lines you have just indicated?

A. I don't recall that he ever did, Mr. Carter.

Q. And if I asked you that same question with respect to the Murchison brothers your answer, I take it, would be the same?

A. Yes, sir. I do recall conversations on the point, but I do not recall he ever told me that he had the authority. I don't believe he did.

Q. But so far as Mr. Kirby was concerned, did he tell you, in substance, that Mr. Kirby would be willing to contribute $900,000 in one form or another?

A. He never separated Mr. Kirby out from the other three at the time of this conversation, sir.

Q. All right. During that same conversation, Mr. Phillips, did Mr. Ireland offer you a 10-year employment contract at $45,000 a year?

A. Well, I can only say, Mr. Carter, that I understood that the suggestion was made to me that Mr. Kirby, the Young estate, or rather Anita O'Keefe Young, instead of [fol. 731] the Young estate, and the Murchisons would offer to me a 10-year contract at $45,000 total sum on the basis of $15,000 each to be contributed by those three persons.

Q. For a 10-year period?

A. As I understood it.

Q. Now, are you definitely sure in your own mind, Mr. Phillips, that the sum of $45,000 a year was mentioned by Mr. Ireland in that conversation?

A. Whether he totaled the three 15 thousands or not, I couldn't honestly say, but I understood that the suggestion was a total of $45,000 a year to me for 10 years.

Q. For 10 years. Now, of course, did Mr. Ireland make it clear to you that so far as the Murchison defendants were concerned and the Young estate that he had no authority to make such an offer to you on their behalf?

A. I can't say that he made it clear to me, Mr. Carter,

because at this time he was talking in terms of a suggestion in which all three major defendants would make a settlement offer, and the suggestion of the contract was also in terms of all three making it, but I knew, of course, [fol. 732] that he had no relationship to the Murchisons as, say, agent or attorney.

Q. Or the Young estate.

A. And similarly to the Young estate. At least, when I say I knew that, that was my understanding. I did not know what his true relationship was.

* * * * * * *

[fol. 733] Q. Now, did you tell Mr. Ireland during the course of that conversation that such an offer was not legally or morally proper?

A. I do not have any recollection of using those words. I rejected the offer and whether this memorandum in its use of the words gives my reasoning unexpressed to Mr. Ireland or expressed to Mr. Ireland I honestly could not tell you, Mr. Carter.

Q. Well, when you say you rejected the offer, did you use just those words to Mr. Ireland or what did you say; [fol. 734] in substance, to him?

A. I could not tell you whether I used exactly those words, Mr. Carter. Looking at this memorandum I could say that I made it clear to Mr. Ireland that I was not interested and I rejected the offer.

Q. And did you feel at that time that under those circumstances the suggestion as coming from Mr. Ireland was illegal and immoral?

Mr. Kissam: I object to his feeling.

The Court: Oh, I will let the witness answer.

A. Mr. Carter, all I can tell you is that I wrote a memorandum in which I used the expression "I rejected the contract as not legally or morally proper, although C.T.I."—Mr. Ireland, that is—"explained it was A.P.K.'s idea, it would be publicly announced and put before Court."

Q. Now, with respect to the latter part of that, did Ireland tell you, in substance, that it was Mr. Kirby's idea, that if you accepted this contract, that it would be publicly announced and put before the Court?

A. Very definitely.

* * * * * * *

[fol. 735] Q. Will you read for us what is written in the lower portion of that exhibit?

A. It has the heading "Federal Common Law" and then there is the note "9:15" which follows merely a note "4:40 P.M." of that day, referring to Judge Dimock. "CTI-APK, gave." Then the next line, "TFD," which stands for Thomas F. Daly, and there is an insert "Unethical story" which to me means that it would be unethical for Mr. Daly to give an opinion on separability in view of the fact that he had a conflict with the Robert R. Young estate.

Then I am quoting again Mr. Kirby communicated to me by Mr. Ireland, "Why the hell didn't he tell me that three weeks ago. Independent counsel. Who do I get now. It is too damn late."

Then what comes next appears to be a suggestion of myself, "Appoint CTI counsel for both yourself," meaning Kirby, "and the corporation. Familiar enough to go before referee and judge."

[fol. 736] Speaking for myself, "With evidence we have here, we can drive other defendants in." Then something is crossed out, that is the meaning.

"They gave them their chance," that is the end of my thinking. And then apparently Mr. Ireland said in effect to me that Mr. Kirby said, "What I want is out; get me out."

* * * * * * *

[fol. 737] Q. You were on his slate, your name—did Mr. Kirby propose you at a directors meeting for an IDS seat?

A. No, sir.

Q. At a stockohlders meeting?

A. No, sir.

Q. What were the circumstances?

A. Mr. Carter, I wasn't there, but my information is that on the day in question Mr. John Tobin of the Donovan law firm, and I think Mr. Ireland—I am not sure of this, though, on recollection—went to Minneapolis and cast their proxies for a slate which included my name, and included the Murchisons' name. It included Fred Kirby and the others. And then I received official notification from the secretary of the company that I had been elected. I also at some point had received Mr. Kirby's letter to me dated April 15, 1960.

Q. When you say they cast their proxies, referring to Mr. Tobin, they were, I take it, agents for Mr. Kirby, were they not?

[fol. 738] A. No, sir.

Q. Whose proxies were they?

A. As I understood it, they cast the proxies of Alleghany Corporation.

Q. Alleghany, all right.

* * * * * * *

[fol. 739] By Mr. Updike:

Q. Mr. Phillips, in connection with the Zenn v. Anzalone litigation in the State Court and Breswick v. Briggs in this court, hearings were held, were they not, before Referee Fitzsimmons with respect to the adequacy and fairness of a settlement proposal that had been referred to him?

A. Hearings were held before the referee in Zenn v. Anzalone. He refused to hold hearings with respect to the adequacy of the settlement in the Breswick case as special master, and he never held a hearing on that decision.

Q. Directing your attention to Zenn v. Anzalone in the State Court, at the hearings before Referee Fitzsimmons, your role in relation to that was allied with Mr. Graubard [fol. 740] who testified here last week, was it not?

A. Allied with?

Q. Yes. In the representation of objectant Rosen, were you not consultant to Mr. Graubard?

A. I was consultant to Mr. Graubard as counsel for objectant Rosen in the State Court.

Q. Did you attend virtually all of the hearings before Referee Fitzsimmons in person?

A. I believe I did.

Q. And prior to those hearings, did you read the depositions in Zenn Federal of Mr. Wallace and of Mr. Young?

A. I certainly read the deposition of Mr. R. Young. I distinctly recall that. I don't believe that prior to the reference I read Mr. Wallace's deposition, I just have no recollection of it.

Q. Did you read it perhaps during the course of the reference?

A. It is quite possible.

Q. I would like you, if you would, to tell us whether you are at least generally familiar with Plaintiff's Exhibit 357 for identification, which was a demand for documentation interposed by Mr. Pomerantz according to the testimony of [fol. 741] Mr. Graubard and marked in evidence in Zenn v. Anzalone in the State Court.

A. I have no recollection of ever seeing this document before, Mr. Updike. It does not mean I did not, but I have no recollection of ever having seen it before.

Q. Will you direct your attention to the paragraph numbered 35, please.

A. Page 7?

Q. I am not certain of the page, but paragraph 35 which is in parenthesis.

A. Yes, sir, I see it.

Q. Do you recall, sir, the demand in that paragraph with respect to financial information concerning IDS?

A. Mr. Updike, I have just stated to you I don't recall I ever saw this document before.

Q. Do you have any recollection with respect to paragraph 35?

A. I have no recollection with respect to that paragraph other than I know Mr. Graubard did examine documents of this nature.

Q. First of all do you recall that Mr. Graubard asked for documents of that nature?

A. I cannot recall the terms in which Mr. Graubard asked for documents.

[fol. 742] Q. I understand that and I hope to refresh your recollection in a moment. But in general?

A. I do recall that Mr. Graubard asked for documents and intensively studied the matter.

Q. During the course of those hearings, again speaking generally, was there a plan as between you and Mr. Graubard with respect to examination of documents that were produced by the defendants' counsel for study in connection with the hearing?

A. I wouldn't characterize any arrangement as a plan. We adapted ourselves to the exigencies of the situation as they arose.

Q. With respect to that adaptation, were projections with respect to financial information one of the objectives that counsel in mind for presentation in that case?

A. I cannot specifically recall anything, Mr. Updike. I have looked at Mr. Graubard's brief and the referee's report, and I cannot honestly say what is my recollection and what is just memory crowded by virtue of seeing these things.

Q. I draw your attention, please, to pages 1943, 1944 and 1945 of that record, and particularly to this language, sir, under the interrogation of Mr. Graubard and looking at the bottom of page 1943, Mr. Graubard reads Mr. Haudek's [fol. 743] examination of Mr. Young in the Zenn Federal case, "Would there be, for instance, in this budget also a forecast of mortgage operations and their results?

"A. There very likely would.

"Q. I would ask you to have a check made for the existence of any such budgets or forecasts or projections of earnings in any form whatever, in the form of a memorandum or in the form of a financial statement or a report, and I would surely appreciate your furnishing those.

"A. Gladly.

"Q. I am referring most particularly to those covering the years 1949, 1950, 1953 and 1954.

"A. Surely.

"Mr. Daly: With reference to IDS, of course?

"Mr. Haudek: Always IDS.

"Mr. Daly: If they are available, we will produce them."

The Court: That is on the examination of Robert R. Young?

Mr. Updike: By Mr. Haudek in Zenn v. Anzalone Federal, and quoted by and adopted in effect by Mr. Graubard.

[fol. 744] The Court: Ask your question of Mr. Phillips.

Q. Mr. Phillips, does that refresh your recollection that one of the objectives of Mr. Graubard and of yourself as a co-worker was a search for projections with respect to the financial operations of IDS?

A. First, Mr. Updike, I have no recollection. Second—

Q. You have a recollection?

A. I have no recollection. I see what you referred me to. I completely have forgotten it, if I heard this made at the time, and I assume I did hear it made. Secondly, I knew Mr. Graubard's objectives and I knew that he was pursuing them. Thirdly, as his assistant, I did for him in respect to this cause of action whatever he suggested that I should do and I had the time to do. I cannot honestly say I have any recollection of any projections, except I do know, it comes back to me after having read Mr. Graubard's brief and the referee's report, that the mortgage projection of IDS, I think furnished by Mr. Purcell, was a very significant document from our point of view at the time.

Q. And that appeared in Mr. Purcell's letter of February 11, 1950?

[fol. 745] A. Not on the basis of any recollection of mine. He told me that or he told the court that and I heard it.

The Court: What is the next question.

Q. Mr. Phillips, I draw your attention to page 1945 and at that point appears this question and this answer in colloquy:

"Q. Did you supply anything to Mr. Pomerantz and Mr. Haudek in regard to this"—this meaning the request for projections—

The Court: It is a question to Mr. Young?

Mr. Updike: Yes.

The Court: This is a question to Mr. Wallace, is it not?

Q. Mr. Updike: Mr. Wallace is being examined by Mr. Graubard before the referee.

The Court: All right, go ahead.

Q. "Q. Did you supply anything to Mr. Pomerantz and Mr. Haudek in regard to this?

"A. No." Then there is an off the record discussion.

The Court: What are you asking Mr. Phillips about? You have a witness on the stand now. What is your question to Mr. Phillips?

[fol. 746] Q. Does this colloquy and that which immediately follows it refresh your recollection that up to this point projection material had not been furnished either to Mr. Graubard or to Mr. Pomerantz or Mr. Haudek?

A. I have no recollection, Mr. Updike, on this matter. I see what you have asked me to look at and I don't doubt that I was there and I don't doubt that I heard it, but beyond that I honestly could not testify further.

Q. Would you go further with me, and I ask you just for your recollection whether following this interchange or colloquy Mr. Graubard continued to ask for financial data in written form from the defendants before the referee?

A. I do have a recollection that Mr. Graubard asked for documents. At what point in time they were, I could not honestly tell you today, and I do have a recollection that we were given file cabinets of documents. I do have a recollection, maybe I don't have a recollection of it because I know this was in the referee's report and in the brief Mr. Graubard wrote which I looked at recently, but I do know we obtained the mortgage projection that we have

been referring to here, which we regarded as a bonanza at the time.

* * * * * * *

[fol. 747] Q. Well, in any event, Mr. Phillips, how it got there, did you regard this as a desirable provision in the stipulation?

Mr. Kissam: I object to that. What difference does it make whether he did or didn't? It is in there.

The Court: Objection sustained. This is the stipulation.

Q. Mr. Phillips, was it the desire of the plaintiffs at that time to get additional evidence from the files of Alleghany with respect to the cases against Mr. Kirby's co-defendants?

A. The purpose of that, as I recall it, Mr. Updike, was that if the litigation continued in the Federal Court against defendants Murchison and Young, Alleghany Corporation would cooperate with us so that we could make an even better case than we thought we could make without their cooperation, by use of the files of Alleghany Corporation with respect to the causes of action in Breswick v. Briggs, and, as you know, none of those causes of action [fol. 748] included the 1950 cause of action. We weren't even thinking in those terms because we had come to the conclusion or agreement among ourselves, meaning Mr. Graubard, Mr. Brussel and myself, that we could not go into the 1950 cause of action, and there is a memorandum by Mr. Graubard's office, dated, I think, October 23, 1959, to that effect, which has been marked in evidence, received in evidence.

Q. Mr. Phillips, would you look at the provision which his Honor—

The Court: Let me ask Mr. Phillips:

Why couldn't you go into the 1950 transaction?

The Witness: Your Honor, Mr. Graubard had sought to intervene in Breswick v. Briggs so as to add the 1950 cause of action. Judge Clancy denied the intervention on the

ground that the injunction of Judge Walsh, dated October 27, 1955, applied only to the Breswick plaintiffs. That was Breswick & Company, Myron Neisloss and, as it so happened, Dr. Clarence W. Bailey. And he refused to allow the intervention. And we—that is, the Breswick plaintiffs did not own stock as of the time of the transaction in question [fol. 749] and had no standing in their own right to plead it.

The Court: I see.

The Witness: And therefore we were of the conclusion, much as we might have liked to, that we had no standing and we could not conscientiously—

The Court: But the attorneys in Zenn v. Anzalone could.

The Witness: And had done until cut off by Mr. Justice McGivern's decision or March 12, '59.

* * * * * * *

[fol. 750] Q. Mr. Phillips, I believe you testified that Mr. Graubard, or you said "we" were not free to inquire into the 1950 IDS transaction with the circumstances you described; am I right about that?

A. I said, Mr. Updike, that on the remand that Judge Dimock had ordered, pursuant to the September 22, 1959 decision, Mr. Brussel, Mr. Graubard and myself had concluded the scope of the remand did not include inquiry into the 1950 cause of action.

Q. Yes. Now, with respect to the stipulation before his Honor, which was to make information available to the plaintiffs against Mr. Kirby's co-defendants, the disability that you just referred to, so far as the 1950 IDS transaction was concerned, did not affect the counsel for the other plaintiffs.

The Witness: May I see that stipulation, your Honor?

[fol. 751] A. I am somewhat confused here by what you are driving at, Mr. Updike. This is a stipulation in the Supreme Court of the State of New York, and my understanding of the situation there was that Mr. Pomerantz had settled all causes of action, including the 1950 cause of action for $700,000, and the reformation of certain joint

venture agreements. We, the Breswick plaintiffs, through negotiation, had caused that offer to be increased by $300,000 more plus return of control of IDS.

Q. I don't want to interrupt you, but this is not my question, sir.

A. Well, this is so I can give you a clear answer, at least within my understanding.

Q. All right.

A. That settlement had been approved by Mr. Justice McGivern on March 12, 1959, and no further evidentiary proceedings were contemplated before him. All he said that he wanted was an affidavit stating that the Breswick injunction had been vacated. Upon the filing of such an affidavit with him he would enter an order pursuant to his March 12, 1959 decision.

[fol. 752] That meant to us, as I recall the circumstances, that the evidentiary record in the State Court was closed and that all that was to take place was a ministerial act, namely, a showing that the affidavit in question existed or that the injunction had been vacated.

Q. Now, going back to paragraph 8 of the stipulation, this had reference to a situation, did it not, Mr. Phillips, where only Mr. Kirby was settling his own liability?

A. No, sir.

Mr. Kissam: Your Honor, it is a purely argumentative question. You have the stipulation in evidence.

The Court: We have the stipulation.

All right, what is the next question?

The Witness: Maybe I answered too quickly.

The Court: What is the next question?

A. This provision, as I recall it, was proposed at a time when it did not seem that the Murchisons and the Young estate were going to join in the settlement. The purpose of the provision, speaking from the point of view of Messrs. Brussel, Graubard and myself, was to assure that Alle-

[fol. 753] ghany Corporation would open its files with

respect to the Breswick causes of action still remaining to be litigated against the Murchisons and Young.

Mr. Updike: Now one further question and I am finished, your Honor.

Q. Mr. Phillips, with respect to Plaintiff's Exhibits 245 for identification and 246 for identification, you testified that it was your recollection that you had seen this type of document at some time, and I understood your testimony to be that it may have been in connection with your service as a director of IDS. Am I correct about that?

A. That is a possibility I did not want to exclude. I do not say it happened, but I did not want to exclude it.

Q. Yes, I understand that. So your testimony, so far as the hearings before Referee Fitzsimmons are concerned, is merely that you do not recall having seen these?

A. I have no memory one way or the other, Mr. Updike.

Mr. Updike: That is all, your Honor.

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[fol. 754] David Teitelbaum, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Mr. McDonald: Your Honor, I was going to state in view of the fact that this is one of my partners I shall not participate, and for the period that Mr. Teitelbaum and Mr. Newton are on the stand Mr. Kissam will be speaking both for Mr. Kirby and for Mr. Ireland.

The Court: You have a right to participate if you want to and you have a right not to if you don't want to.

Direct examination.

By Mr. Carter:

Q. Mr. Teitelbaum, of course we know, but I want the record to show that you are a partner of the Donovan, Leisure, Newton & Irvine firm, is that right?

A. Yes.

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[fol. 755] Q. Now, on the 17th did the Donovan, Leisure firm agree to undertake this representation of Mr. Kirby?

A. They agreed to do so upon being substituted in place of Lord, Day & Lord.

Q. Now I show you these two stipulations of substitution, one in Zenn-Anzalone and other in Breswick-Briggs, and ask you if Mr. Kirby affixed his signature to those documents while in your office on the 17th of December, and if you will look at the acknowledgment it will probably help you answer the question.

A. I cannot so testify of my own knowledge. I think the documents which you have handed me speak for themselves.

[fol. 756] Mr. Carter: I will offer them in evidence, if the Court pleases.

The Court: No objection; I will receive them in evidence.

Mr. Kissam: I am sure we have no objection. I would just like to see them.

The Court: All right, received in evidence.

(Plaintiffs' Exhibits 28 and 35 received in evidence.)

Q. Now, Mr. Teitelbaum, do you have personal knowledge when Lord, Day & Lord affixed their signature to the two stipulations of substitution?

A. I know only that I was informed on December 18th that they had done so.

Q. That would be Friday?

A. Yes, sir.

Q. Do you know the circumstances under which Lord, Day & Lord affixed their signature to those stipulations of substitution, how it was arranged?

A. My recollection is that Mr. Ireland was to go over to Mr. Daly and explain to him what was to be done. Whether that in fact happened I cannot say.

Q. I think the record so discloses, Mr. Teitelbaum, but [fol. 757] in any event prior to the time Lord, Day & Lord affixed their signature to those stipulations of substitution had you talked with anybody in that firm with respect to the substitution itself?

A. No, sir.

Q. So far as you know did Mr. Newton?

A. I don't know whether Mr. Newton had or not.

Q. All right. Was it made clear to you on or about December 17th that Mr. Thomas F. Daly was the partner of Lord, Day & Lord who had been in charge of the litigation?

A. Yes, sir.

Q. Now, when for the first time, Mr. Teitelbaum, did you speak with Thomas Daly on this subject matter?

A. Certainly by the following Monday. It is less clear in my mind whether I spoke to him on that Friday, the 18th, or not, but certainly by Monday, which was December 21st.

Q. Well now, was Monday the 21st the day you presented initially to Judge Dimock the show cause order seeking to lift the Judge Dimock injunction?

A. No, sir.

Q. Was that Tuesday, the 22nd of December?

A. The show cause order was presented to Judge Dimock [fol. 758] in the course of the hearing before Judge Dimock on December 22nd.

Q. Right.

A. The hearing was not in the first instance held on the show-cause order.

Q. I understand that.

A. It was presented to Judge Dimock because a question was raised by Mr. Adams as to the sufficiency of notice and the show cause order was designed to eliminate any such question.

Q. During your December 17th or 18th conference was there any discussion with respect to substitution of counsel for Alleghany Corporation as distinct from Allan P. Kirby?

A. Mr. Carter, you have referred to a discussion of December 17th or December 18th. I am perplexed.

Q. All right. At any time prior to December 18th was there any discussion relative to a substitution of attorneys for Alleghany Corporation?

A. Yes, sir.

Q. And so that we can be specific, what date was that? Was it the 17th or the 18th?

A. My best recollection is that that occurred on De-
[fol. 759] cember 17th at the same meeting that I was telling you about with Mr. Kirby.

Q. All right. So that we can move along, was it understood or agreed or decided on the 17th that Charles T. Ireland would be substituted for the counsel then representing Alleghany Corporation?

A. It was pointed out that Lord, Day & Lord had been acting as counsel for Alleghany Corporation as well as for Mr. Kirby and the Young Estate in these derivative lawsuits, and that it would be appropriate to have a substitution in regard to Alleghany Corporation as well, and after some discussion in the course of which it was pointed out that Mr. Ireland was of counsel to Alleghany Corporation, it was decided that a substitution of Mr. Ireland for Lord, Day & Lord as counsel for Alleghany Corporation in the derivative suits would be desirable.

Q. And, of course, the claims underlying these derivative suits were for the benefit of Alleghany Corporation, were they not?

A. Yes, indeed.

* * * * * * *

[fol. 760] CARL E. NEWTON, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Carter:

Q. Mr. Newton, you are the Carl Newton who is one of the partners in Donovan, Leisure, Newton & Irvine, are you not?

A. Yes.

Q. You are a member of the bar, of course?

A. Yes.

Q. Now, did your firm represent Allan P. Kirby in late December 1959 in connection with his settlement of his liability in the derivative suits that were then pending?

A. Yes, and Alleghany Corporation.

Q. So, as I understand it, Donovan Leisure, during the late days of December 1959, represented not only Allan P. Kirby but Alleghany Corporation, am I correct?

A. Yes, sir.

* * * * * * *

[fol. 761] Q. How soon thereafter did you again hear from Mr. Phillips?

A. A few days. I would say either the 14th or 15th, because, as I recall, the 15th was a Wednesday and it was a day or two before that.

Q. Was it by telephone?

A. Yes, sir.

Q. Did he put in the call to you?

A. He did.

Q. What did he say to you on that occasion and what did you say to him?

[fol. 762] A. He said that Mr. Ireland was really up against a gun, that the plaintiffs and Mr. Kirby had arrived at an agreement, but it was apparently not susceptible of being put through because of the conflict of interest that Tom Daly found himself in, and Mr. Ireland would like me —Mr. Ireland of course I understood was a spokesman for Mr. Kirby—that Mr. Kirby had said there wasn't anybody he would rather have take over this situation than my firm, because we have known Mr. Kirby for many years, and wouldn't I be available. I said, "Look, Randolph, I told you I cannot be available, I could not take on any litigation for anybody. Why do you call me?"

He said, "I am right here with Ireland."

I said, "Put him on."

He put Ireland on the phone.

Q. Did you talk to Ireland?

A. Yes, sir.

Q. What did you say to him and what did he say to you?

A. I told him the same thing I had told Phillips, I told him, "I am very sorry, Mr. Ireland."

He said, "I don't know you, but I know who you are," and I told him, "I know about you too, Mr. Ireland."

[fol. 763] He said, "Is there somebody else in your firm that could take it on?"

I said, "Our litigating manpower is very busy at the moment."

He said, "May I come down and talk it over with you, maybe you can find somebody to handle it for me?"

I said, "Sure, come on down."

We made an appointment and on the 16th he came down.

Q. When he came down was he with Phillips?

A. He was.

* * * * * * *

[fol. 764]

THOMAS F. DALY, called as a witness, being first duly sworn, testified as follows:

Mr. Carter: Your Honor, I have one more important document that the plaintiff would like to offer in evidence, which I overlooked, and it is marked Plaintiff's Exhibit 27 for identification, which is the Judge Dimock opinion of September 22nd.

The Court: Received in evidence.

(Plaintiff's Exhibit 27 received in evidence.)

Direct examination.

By Mr. Carter:

Q. Mr. Daly, you are, of course, a member of the Bar of the State of New York, are you not?

A. I am, sir.

Q. And also a member of the bar of this court?

A. Yes, sir.

Q. And are you and have you been a partner in the law firm of Lord, Day & Lord?

A. Yes.

Q. In that capacity did your firm undertake the representation of Allan P. Kirby some years ago in connection with derivative actions filed in the State Supreme Court and in this court in which Mr. Allan P. Kirby was named [fol. 765] as a defendant?

A. My recollection is that we did not represent Mr. Kirby in the State Court proceedings, that he was not a defendant there. I do not think he was—he was a named defendant, but had never been served. I do not think he was served, although he may have been in the Zenn action in the Federal Court. If he was, we entered an appearance somewhat in the nature of a special appearance. We did not—I think we contended that the Court had no jurisdiction.

Q. Not to interrupt you, Mr. Daly, but so we can go on—

A. The answer will show, of course.

Q. I think the record indicates that Mr. Kirby in the Zenn-Anzalone federal action was not only a named defendant but a served defendant.

A. I think he was, but the point I was trying to make was that I think he was served in New Jersey and we were always reserving the question of jurisdiction.

Q. Mr. Daly, did the firm of Lord, Day & Lord on behalf of Allan P. Kirby in the Zenn-Anzalone federal action file an answer?

A. In the state?

Q. No, in federal Zenn. I think the record shows that you [fol. 766] did.

A. I think we did, but the record would show.

Q. Yes. And did your firm represent Mr. Kirby as a named defendant in the Breswick v. Briggs litigation?

A. Yes, although I think, there, there was a question of jurisdiction, but the record would show that.

Q. All right. Were you assigned by your firm as the partner in charge of that representation?

A. Yes, I was in charge of the various actions.

Q. And for the period, let us say, all-inclusive 1955 down to a certain time in 1959 did you actively discharge your duties in that connection? Were you active in discharging your duties?

A. I was.

Q. During that period of time, Mr. Daly, '55, let us say, through '59, on how many occasions, if you can tell us, did you actually speak face to face with Allan P. Kirby?

A. You mean prior to the coming down of Judge Dimock's decision?

Q. Well, I will take that point, yes; from, let us say, '55, when your firm undertook the representation of him, [fol. 767] say, to the time that Judge Dimock promulgated his decision.

A. I can only recall one time where I met Mr. Kirby face to face. There may have been a second time when I ran into him at the University Club, but that was only to say how do you do.

Q. Now, during that period of time did you ever on that one occasion, when you saw him, discuss the merits of the causes of action in which he was a named defendant with him?

The Witness: Your Honor, there is a question of privilege involved here. I do not know whether it has been waived or not.

The Court: You can say whether you did discuss it. If he asked you what you discussed, then the question of privilege may come up.

A. To a limited extent.

Q. Well, I am thinking particularly in terms of the second cause of action in Zenn vs. Anzalone in the Federal Court. Did you ever discuss with Mr. Kirby the merits or demerits of that cause of action?

The Witness: Does that call for a conversation, your Honor?

The Court: No. I think you can state whether you did [fol. 768] discuss it. What you discussed might be privileged, but whether you discussed it or not is a fact.

A. I can recall no discussion of it other than possibly mentioning the cause of action.

Q. Did you ever, Mr. Daly, have occasion to review Mr. Kirby's files that contained documents which may or may not have been pertinent to the defense of any of the causes of action in the derivative cases?

A. Not that I know of.

Q. On the one occasion that you did see Mr. Kirby, was that in your office or out in Morristown?

A. I will have to amend my other answer. I did see Mr. Kirby more than once. I saw him—the first time I saw Mr. Kirby was up in the Alleghany office. The next time I saw him was in Morristown, after Mr. Young's death, outside of that casual meeting in the University Club. I don't think I saw Mr. Kirby again until after Judge Dimock's decision referring the matter back to the special master came down.

Q. On the occasion when you saw Mr. Kirby in Morristown after Mr. Young's death, was that of a social nature as distinct from business?

A. No, it was a meeting in connection with the law- [fol. 769] suit.

Q. When did you in point of time learn of Judge Dimock's decision? We are talking of the one of September 22, 1959.

A. As I recall it from my diary entries that were put in on my deposition a few weeks ago, Judge Dimock's decision came down on a Friday, I don't remember the date. I did not hear of it until the following Monday, whatever those dates were.

Q. Who called it to your attention, if anybody?

A. I think Mr. Wallace called me and said that Mr. Phillips had called him and told him that the decision was down.

Q. Thereafter did you read Judge Dimock's decision?

A. Oh, yes.

Q. In your professional judgment did this mean to you that the hearings before the referee or special master Fitzsimmons would be reopened for the purposes indicated?

A. It did.

Q. Did you also believe at that time that that would entail the appearance of Mr. Kirby before referee or special master Fitzsimmons as a witness?

A. I though it might.

[fol. 770] Q. Up to that point of time, had Mr. Kirby appeared before Fitzsimmons either in his capacity as a referee or special master in connection with the hearing that Mr. Fitzsimmons held?

A. No.

Q. Is it the fact that during the 1955-56 period, Mr. Graubard on behalf of his client had made efforts to obtain the appearance of Mr. Kirby as a witness before Referee Fitzsimmons?

A. Yes.

Q. I take it those efforts were unsuccessful?

A. Mr. Fitzsimmons did not require Mr. Kirby to appear.

Q. For medical reasons?

A. For medical reasons.

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[fol. 771] Q. Do you remember having a conference with Mr. Ireland in your office at or about that time where you discussed the Dimock decision and its impact and effect upon the then pending litigation?

A. Well, I remember that Mr. Ireland came down to my office some time after Judge Dimock's decision, and I assume that I discussed Judge Dimock's decision with him there, because we always discussed it when we met.

Q. Now, do you recall whether Mr. Ireland told you that Mr. Kirby was concerned about the Dimock decision?

A. I think the meeting you are referring to—no, I can't say that Mr. Ireland told me that. I already knew it because I had talked to Mr. Kirby.

Q. Well, now—

A. But it may have been said. We were all concerned about it.

Q. I am thinking in terms, in the absence of a date from you—

Mr. McDonald: I can't hear the question.

Q. In the absence of a date from you, Mr. Daly, as to the time you talked with Ireland after the Dimock decision, in order to aid you, I am asking you to tell us about the [fol. 772] meeting you had with Mr. Ireland where a discussion about the prospective future role of Randolph Phillips was concerned. Would that help you, sir?

A. Yes, I understand now what you want.

Q. Now, before you tell us that, could you approximate the date for us?

A. No.

Q. I know you cannot pinpoint it.

A. No, sir, I cannot except that it was some time after Judge Dimock's opinion came down and some time before Mr. Ireland started negotiating with Mr. Phillips.

Q. Are you reasonably sure that it was after Judge Dimock's decision?

A. Oh, yes, that I am certain of.

Q. All right. Now, will you tell the Court the substance of that conversation?

A. Well, this meeting with Mr. Ireland resulted from a telephone call from Mr. Kirby, which I suppose I cannot go into, but anyhow, Mr. Ireland came down and in the course of the conversation Mr. Ireland told me, or I related, I suppose I related the conversation I had with Mr. Kirby to the effect that he had said that Mr. Ireland and Mr. [fol. 773] Phillips were friends, that they had met socially, that their wives were friends, and that Mr. Ireland thought that he probably could negotiate a settlement with Mr.

Phillips; that Mr. Kirby had repeated to me what he had said before, that he was very much concerned about the expense and the time that had been spent on this litigation, and he felt that if it could be settled it would be in the best interests of everybody to settle it.

I expressed surprise to Mr. Ireland that the fact that he was friendly with Mr. Phillips and socially friendly with him. I had not known that. I said that I was reluctant to consent to Mr. Ireland seeing Mr. Phillips because of our previous experiences, but in view of the time and the money that had been spent on this litigation I did not really feel that I should stand in the way of any effort that could be made to settle it, providing the defendants were not prejudiced, because we had had the experience previously where we were negotiating at the request of Judge Walsh, and we finally got ourselves in the box where we were bidding against ourselves, because every time we made an offer, then it would go back to back to Judge Walsh, saying, [fol. 774] "Well, see, they don't think it is a fair settlement because they have increased the amount," and I said, "I don't want to see you get in that bind again."

That I think was the substance of that conversation.

Q. Did you tell Mr. Ireland, in substance, during that conversation that Phillips had started the litigation as a retaliation against Robert Young?

Mr. McDonald: Your Honor, this is a highly competent witness. I do not think we have to lead this witness. I object to leading him.

The Court: I think he is suggesting a subject for him. I do not think he is leading him.

You can answer yes, no or with an explanation.

A. The substance of that was said. I do not think I said it in exactly those words.

Q. Yes. Now, during the course of that conference with Mr. Ireland did you acquaint him with something Young had told you about Phillips' demand for a job?

A. I don't know whether that was discussed at that meeting or not.

Q. Was it discussed at any meeting?

A. Well, I think everybody just knew about it. I cannot [fol. 775] remember any discussion.

Q. What is it that you think just everybody knew?

Mr. Phillips: Object, your Honor. It is total hearsay. It is not relevant to anything in this case. Mr. Young was dead by the time this corrupt bargain allegedly took place.

The Court: Well, I do not know that it is particularly relevant, anyway, is it, Mr. Carter?

Mr. Carter: Other than the fact that—

The Court: It shows that Mr. Phillips was a bad boy?

Mr. Carter: No, that he had what we characterize as an inordinate ambition to get a job within the Alleghany complex, and that he had demanded a job of Mr. Young which, of course, he denied.

The Court: Well, Mr. Phillips has denied it. I do not know how Mr. Daly can give you anything other than hearsay evidence on that.

Q. Did Mr. Young ever tell you that, Mr. Daly?

Mr. Phillips: Objection.

A. I haven't any recollection of Mr. Young telling me.

Q. Did Mr. Glenn tell you?

[fol. 776] Mr. Phillips: Objection.

The Court: Objection sustained. Hearsay.

Mr. Carter: All right.

The Court: If Mr. Phillips told him, it would be all right.

Mr. Phillips: Pardon?

The Court: I say if you told him, why, that would be admissible, but what Mr. Glenn told him is not admissible.

Q. Did Ireland express optimism or pessimism, or what did Ireland say with regard to the prospects of his efforts with Randolph Phillips?

A. Well, as I recall the conversation, Mr. Ireland did not share my opinion of Mr. Phillips, and said that I was mistaken in my opinion of him, and that he thought that he could negotiate with him, and negotiate without any of the matters coming back that I was concerned about.

Q. Well, did you leave it, as the result of that conference, was it understood between you and Mr. Ireland that he would commence these negotiations with Mr. Phillips?

A. No. It was left with Mr. Ireland that I would report back to Mr. Kirby as to how I felt about it.

[fol. 777] Q. And did you so report?

A. I did.

Q. Do you claim privilege in connection with the report that you made to Mr. Kirby?

A. I am afraid I have to. I think it was a telephone conversation.

The Court: I will sustain the privilege.

Mr. Carter: All right. I just wanted to move along.

Mr. McDonald: Well, your Honor, I think I should tell Mr. Daly that we are not claiming privilege on these conversations, Mr. Daly.

The Court: If Mr. Kirby wishes to waive the privilege, I suppose then Mr. Daly is free to testify, if Mr. Kirby would waive the privilege of the communication.

Mr. Kirby is in court.

Do you waive the privilege, Mr. Kirby?

Mr. Kirby: Yes, sir.

The Court: All right, then, Mr. Daly, Mr. Kirby has waived the privilege and I suppose the privilege is personal with him, so you can testify.

Q. Do you recall the question?

[fol. 778] A. Yes. I think it was in a telephone conversation with Mr. Kirby. I called him and said that I had spoken to Mr. Ireland and in view of Mr. Kirby's feelings about the large expense and the desire to end this litigation, while I was reluctant, I did not feel that I should stand in the way of Mr. Ireland negotiating with Mr. Phillips,

but again I said to Mr. Kirby what I had said to Mr. Ireland:

> "I hope that Mr. Ireland doesn't make any offers; that if any offers are made they come from Mr. Phillips."

Mr. Phillips: I'm sorry, Mr. Daly, I could hardly hear you because of the noise at the window.

The Witness: If any offers came, they came from Mr. Phillips rather than Mr. Ireland.

Q. What did Mr. Kirby say, in substance, during the course of that conversation?

A. I don't recall he said anything. I was reporting to him as he had asked me to do, as to what my reaction would be after meeting with Mr. Ireland.

Q. Well, did he say, in substance, that it was all right with him if Mr. Ireland went ahead under those conditions and conducted negotiations with Mr. Phillips?

[fol. 779] A. I think all he said was thank you. I don't remember him saying anything about it at all.

Q. Thereafter, on occasions, did Mr. Ireland report back to you the substance of the conversations he was having with Mr. Phillips?

A. Yes.

Q. Mr. Daly, in this regard do you have any notes or diary or any other memoranda by which your recollection might be refreshed?

A. No, sir, I never made any memoranda of those conversations.

Q. And from a point of time, then would you say that during the months of October and November Mr. Ireland reported to you with some regularity on the progress of his negotiations with Mr. Phillips, if any?

A. I cannot remember there being any regularity. I can only remember once or twice, until the final one, where he reported that he had been seeing Mr. Phillips.

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[fol. 780] Q. Mr. Daly, so that the record may be clear, is it the fact that during 1959 up until the 18th of December, the firm of Lord, Day & Lord represented Allan P. Kirby and Alleghany Corporation?

A. Yes, in certain matters.

Q. During the fall of 1959 and particularly after Judge Dimock's decision, did you or anybody connected with Lord, Day & Lord negotiate with Mr. Brussel or Mr. Graubard?

A. No, sir.

Q. We have heard some testimony in this case that Mr. Kirby in the fall of 1955 had asked you for an opinion letter with regard to a separate settlement.

A. You mean 1959?

Q. Yes, 1959. Could you shed some light for us on that?

A. After this triple $900,000 matter, Mr. Kirby asked me to speak to Mrs. Young and see if Mrs. Young would agree to pay that amount in settlement. I spoke to Mrs. Young and came back and told Mr. Kirby the answer was no.

Then, as I recall it, Mr. Kirby asked us for an opinion as to whether or not he could settle individually as distinguished from the Young Estate and the Murchisons.

[fol. 781] Q. And when would you place the time of that request?

A. Some time after I saw Mrs. Young, as I recall it, and my diary entry on that was read into the deposition.

Q. At the time did Mr. Kirby tell you he was going to attempt a separate settlement?

A. I don't think he said it in so many words, but after I came back and told him that Mrs. Young would not settle, he then asked for the opinion as to whether he could settle individually. I don't remember any more discussion. I drew certain inferences from that.

Q. Did you give him such an opinion?

A. No, we never did.

Q. When you say no, you never did, you mean you never gave him one orally or in writing?

A. After thinking it over, I decided there was a conflict of interest and I so told Mr. Ireland.

Q. When was it, if you can approximate for us the date, that you told Mr. Ireland that you thought there would be a conflict of interest?

A. Some time during the latter part of that period, but I cannot be any more definite than that.

[fol. 782] When was the substitution of attorneys?

Q. December 18th.

A. I would say it was maybe a week, two weeks, maybe three weeks prior to that time.

Q. Mr. Daly, is it the fact that in your mind at least the conflict arose as a result of your feeling that Mr. Kirby was going to make a separate settlement?

A. No, my conflict arose because Mr. Kirby had asked me for an opinion as to whether he could settle individually, and I drew an inference that perhaps he would, but whether he would or not I felt there might be a conflict of interest if I gave such an opinion.

Q. Did you also feel that there might be a conflict of interest if he settled separately and Mrs. Young did not?

A. Of course I felt that there would have been a conflict of interest.

Q. After this conference you told us about with Ireland, do you have any recollection of talking with him again?

A. You mean about this $900,000?

Q. Yes.

A. Yes. I don't remember anything specifically; I think he was present when I came back from seeing Mrs. Young [fol. 783] and told Mr. Kirby that Mrs. Young did not want to settle. Then, of course, I had the telephone conversation with Mr. Ireland in which I told him that I felt there was a conflict of interest and I did not think we could give Mr. Kirby an opinion on settling individually. Outside of that I have no recollection of any meetings with Mr. Ireland after that.

Q. Mr. Daly, do you recall that Mr. Kirby was in Camden, South Carolina, from approximately December 2nd to December 9th of 1959?

A. I know that he was; I don't remember the date.

Q. Do you recall having a conversation with him either by telephone or face to face after he returned?

A. The last conversation I remember with Mr. Kirby is when I came back from Mrs. Young, whatever the date was.

Q. Can you help us with respect to that date?

A. I cannot, but the diary entry was read into the record on my deposition and you must have it.

Q. In any event, what did you say to Mr. Kirby on that occasion and what did he say to you?

A. I just said to Mr. Kirby that Mrs. Young did not [fol. 784] want to settle and would not settle.

Q. Was there any talk between you and Mr. Kirby as to the negotiations going on between Ireland and Phillips?

A. The negotiations had resulted in this $2,700,000 proposition, and that is what I had gone up to see Mrs. Young about.

Q. Let me ask you this, then, in an overall question, Mr. Daly: Is that the last information you had on the progress of negotiations between Ireland and Phillips until you were told something on the 21st or 22nd of December, 1959?

A. Until I was told over at Donovan, Leisure's office, that is my recollection now.

Q. That was about December 21, 1959?

A. No, it was later than that. It was sometime in that period.

Q. Were you present before Special Master Fitzsimmons on December 16, 1959?

A. That is the time—yes.

Q. Do you recall—

A. That is when we were setting the date for the resumption of the hearings.

Q. And he did set such a date, did he not?

[fol. 785] A. Yes, if that was December 16th, I was there, I don't remember the date.

Q. When for the first time did you learn that the Donovan, Leisure firm was to be substituted for Lord, Day & Lord?

A. When Mr. Ireland came into our office, I have forgotten the date, with the stipulation of substitution.

Q. Would your recollection be refreshed if I told you that was December 18, 1959?

A. Certainly the stipulation of substitution would show the date. If that is the date on it, that is the date it is.

Q. Did you see Mr. Ireland on that occasion?

A. Yes.

Q. Would you tell the Court what he said to you and what you said to him?

A. Yes. After the pleasantries with Mr. Ireland—I met with Mr. Ireland in Mr. Brownell's office, Mr. Brownell also being present. After the pleasantries were exchanged, he said that Mr. Kirby felt that there was a conflict of interest because he wanted to settle, and therefore he felt that there should be a substitution of attorneys. That was [fol. 786] about the substance of the conversation.

Q. Did you sign the substitution?

A. Yes.

Q. On that occasion did Mr. Ireland tell you that he and Phillips had arrived at a money figure of $1,100,000 to settle Mr. Kirby's liability?

A. No. My recollection is that the first time I knew about that was, I guess, the following Monday—I think this was on a Friday—when I went over and talked to Mr. Ireland and Mr. Teitelbaum at Donovan, Leisure's office. My recollection is that is the first time I knew.

Q. At any time after you went to the Donovan, Leisure office on December 21, did Mr. Kirby tell you that they had arrived at a money figure to settle his individual liability?

A. No.

Q. What were the circumstances which led you to the Donovan, Leisure office on December 21?

A. Mr. Teitelbaum called me up and asked me to come over, and said they had made the settlement on behalf of Mr. Kirby or a settlement had been made on behalf of Mr. Kirby, and that Mrs. Young could also settle with the

Phillips group for payment of $900,000, and that the Mur-
[fol. 787] chisons could buy their peace with the same amount. That was the substance of what he told me.

Q. What did you say?

A. I tried to persuade Mr. Ireland that Mr. Kirby should pay Mrs. Young's $900,000, because I felt he had brought about the settlement, and Mrs. Young did not want to settle, and that I thought it would be fairer if Mr. Kirby paid Mrs. Young's $900,000. I was so insistent, Mr. Ireland said he would go out and call Mr. Kirby and report.

He came back and told me that Mr. Kirby did not agree with my reasoning, and he did not feel he was under any obligation to assume Mrs. Young's share of the proposed settlement.

Q. Were you consulted at all in that period, and I am talking about December 21, 1959, with respect to the provisions of a stipulation of settlement on behalf of Mr. Kirby?

A. I don't recall that being discussed that day in the office, and we went to court, I think, the next day. As I recall it, Mr. Adams spoke long and eloquently on the question of the stipulation, and there were various changes
[fol. 788] made, but I really said nothing about it. Mr. Adams had the laboring oar there.

[fol. 789] Q. At any time in that period were you acquainted with the fact that there had been talks, discussions between Mr. Ireland and Mr. Phillips with respect to an IDS directorship, or a representative of the plaintiffs in the derivative actions?

A. No, sir.

* * * * * * *

[fol. 790] By Mr. Updike:

Q. Mr. Daly, I believe Mr. Carter has already asked you questions concerning your discussions, such as they were, with Mr. Kirby with respect to the 1950 IDS transaction, as we call it here; am I correct in that?

A. Yes.

Q. Now, am I correct in my understanding that neither you nor anyone connected with your firm ever made a search through Mr. Kirby's files in Morristown with respect to documentary information that might have bearing in that case?

A. Yes.

Q. Now, sir, directing your mind to the period when there was a series of hearings before Referee Fitzsimmons with respect to the proposed settlement in Zenn v. Anzalone in the State Court, and to some extent with respect to Breswick v. Briggs in this court, I ask you, sir, whether [fol. 791] you or your firm searched the Alleghany files for documents with respect to the matters there in litigation or whether on the other hand those documents were furnished to you by some representative of Alleghany?

A. I would say certainly in the main they were furnished by Mr. Wallace. I cannot say that when I was up there that something was not on the desk that I picked up, but Mr. Wallace would furnish the documents.

Q. And basically that is your recollection with respect to the documentation that was furnished, for example, to Mr. Pomerantz and Mr. Graubard in the course of those hearings?

A. No. That was so with reference to Mr. Pomerantz, but as I recall it, Mr. Graubard was given access to the files of Alleghany Corporation, and they were brought over, I think, to the Biltmore Hotel under the supervision of Mr. Martin who was the attorney for the Alleghany Corporation at that time, and I was not present at any of these examinations or anyone from my office, as I recall it, and Mr. Graubard had access to all of those files, and as I understand it, went through them.

[fol. 792] Q. Well, now, as far as your firm is concerned, neither you nor any representative of your firm, itself, went to Alleghany and went through the Alleghany files in connection with those hearings?

A. That is my recollection.

Q. And Mr. Martin, to whom you just referred a moment ago, was he then an associate or a former associate of Lord, Day & Lord?

A. He had been a former associate of the office.

Mr. Updike: That is all, your Honor.

The Court: All right, Mr. McDonald.

Cross examination.

By Mr. McDonald:

Q. Mr. Daly, throughout the derivative litigation you represented either Mr. Young or later his estate, didn't you?

A. I did, yes.

Q. And he was an active defendant at all times, wasn't he? He was served and had answered and he appeared?

A. Oh, yes.

Q. Now, am I correct during the first few months of your representation you and your firm were engaged in learning the facts about the case?

A. Yes, sir.

[fol. 793] Q. And then there came a time along about the fall of '54, December, '54, when Mr. Wallace's deposition was taken, wasn't it?

A. That's right.

Q. Mr. Pomerantz examined him?

A. Mr. Pomerantz or his partner, Mr. Haudek.

Q. Were you there?

A. No; Mr. Scott of my office was there.

Q. And then Mr. Young came on for examination, did he not?

A. Yes.

Q. And were you there at that time?

A. I was at Mr. Young's deposition.

Q. Do you know whether Mr. Young produced his own files in the course of this proceeding, not necessarily at the deposition, but at the hearings before the referee?

A. He produced whatever he was asked to produce. Now I have no recollection whether he kept his individual files separate from Alleghany or not. If he did, they were produced, if he was asked to produce them.

Mr. McDonald: I am going to telescope this, your Honor, very briefly.

A. (Continuing) In fact, I think Mr. Young's files were [fol. 794] also produced at this examination that Mr. Graubard had requested, and the files were all brought over to the Biltmore. That is my recollection.

Q. That was my impression. Now, at the occasion of Mr. Young's deposition you met Mr. Pomerantz, I think, for the first time, didn't you, at least in connection with this?

A. In connection with this action, yes.

Q. Previous to that, Mr. Scott of your office, I think, had been in touch with him?

A. That's right.

Q. And had been supplying documents he requested?

A. That's right.

Q. This meeting led, then, to the discussions of settlement which occurred in April of 1955.

A. That's right.

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[fol. 795] Q. At the time you went into that discussion you had reached an informed professional opinion in your own mind as to the value or lack of value of these claims, hadn't you?

A. Yes, sir.

[fol. 796] Q. What was your opinion at that time?

A. That we would be successful if we tried the case.

Q. Now, of course, as has been brought out in the Zenn transcript, Mr. Pomerantz disagreed?

A. He did.

Q. And that was the basis of your discussion.

A. Correct.

Q. Mr. Daly, during the next four years did you have repeated occasions to reiterate your view that these claims were without merit?

A. I did, sir.

Q. You did that actually on the stand under oath, didn't you?

A. I did, sir.

Q. And in your affidavits?

A. Yes, sir.

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[fol. 797] Q. All right. When Mr. Young died, Mr. Daly, did you write a letter to Mr. Moore giving your view of the merits or value of this litigation?

A. I know I wrote a letter to Mr. Moore. If you have it there I would like to see it. I assume I did. I must have.

Q. We have marked as Kirby Exhibit 29 a copy of a letter I would like for you to identify, dated February 18, 1958, and I ask you if that was the letter that you wrote to Mr. Moore at that time with respect to the then-pending litigation with which he would become involved representing the Young estate?

The Court: Who is Mr. Moore?

Mr. McDonald: He is the Newport counsel for the Young estate.

Q. That is correct, isn't it, Mr. Daly? I want to get it on the record from you.

A. Yes, Mr. Moore is Mrs. Young's personal attorney and also is attorney for Mrs. Young as executrix for the will that was filed in Rhode Island.

Q. Was that letter written by you at the time?

A. This was written by me at the time.

Q. Did it accurately express your professional opinion of this case as well as others?

[fol. 798] A. It did.

Mr. McDonald: I offer it in evidence, your Honor.

The Court: What is the significance of it?

Mr. McDonald: The significance, your Honor, is that after reviewing the Zenn vs. Anzalone litigation, the opinion of Lord, Day & Lord is stated that while the amounts asked for are astronomical in their judgment there is no merit to the litigation.

The Court: What significance has that got in this case?

Mr. McDonald: It is apropos of your Honor's interpretation of the letter of October 22nd which was written to Mr. Kirby and we insist was not an evaluation but which they for two years have argued was a statement by this counsel of his opinion of the litigation.

The Court: Well, I think it was clear that that letter was a statement to Mr. Kirby of what the maximum would be if the plaintiffs were successful. That has been testified to. And it is not an evaluation of what they thought the case was worth.

Mr. McDonald: Let me ask one question and probably clean it all up.

[fol. 799] The Court: All right.

By Mr. McDonald:

Q. Mr. Daly, at the time you wrote the letter of October 22, 1959, which Mr. Carter showed to you, were you purporting to appraise the probability of winning or losing the derivative litigation?

A. No, sir.

The Court: That time you were answering Mr. Kirby's inquiry that if he lost all along the line what the maximum liability would be.

The Witness: That's right, sir.

The Court: I think that is what Mr. Kirby testified to.

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[fol. 800] Redirect examination.

By Mr. Updike:

Q. Mr. Daly, on your examination by Mr. McDonald I believe you stated that in connection with the hearings before the referee Mr. Young produced all of his files.

Now, do I understand that to be subject to the limitation which I understood you to testify to earlier, that you and your firm did not search the files, but you relied on another source to furnish you with what you believed to have been all the files?

A. As I said, my recollection is that at Mr. Graubard's request the referee requested and required that all of Mr. [fol. 801] Young's files be brought over to the Biltmore, and inspected there under the supervision of Mr. Martin. I understand that was done. I never saw any of those files. I cannot say whether they were all produced or whether they weren't but I understood that they were.

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[fol. 802] Thomas F. Daly, resumed.

Recross examination.

By Mr. McDonald:

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[fol. 803] Q. May I ask, Mr. Daly, if you made an investigation of Mr. Kirby's files in connection with the hearings before the referee in Zenn, did anybody ask you to do so?

A. I have no recollection of that.

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[fol. 805] The Court: Next witness.

Mr. Updike: Would your Honor like to have the answers come from up at the stand on depositions?

The Court: I think it would be more intelligible if someone reads the questions and someone else reads the answers.

Which deposition is this?

Mr. Updike: Deposition of Frank B. Bateman.

[fol. 806] Mr. Meyer: Page 3-A, line 11:

"Q. Mr. Bateman, for the record, where do you live?

"A. 209 Banya Road, Palm Beach, Florida.

* * * * * * *

[fol. 807] "Q. For how long were you a director after that?

"A. Must have been until some time in 1950, because the Alleghany annual report which I have shows that I was a director in 1950 and I was not a director in 1951. I haven't got the exact date of my resignation.

* * * * * * *

[fol. 808] "Q. Was each member of the committee doing his own investigation—

"A. That's my recollection.

"Q. Did you personally make such an investigation of IDS or Investors Syndicate, as it was known at that time?

"A. Yes, I did.

"Q. Did you discuss your investigation with Mr. Young?

"A. Yes, sir.

"Q. Did you discuss it in Palm Beach with him?

"A. Yes.

"Q. Did you discuss it with Mr. Kirby?

"A. Yes."

* * * * * * *

[fol. 809] "Q. Mr. Bateman, when you went down to Palm Beach to meet with Mr. Young between March 16th and March 21st, as reflected in Exhibit 259 for identification, who else was present?

"A. Mr. Purcell and Mr. Shipman.

[fol. 809a] "Q. And Mr. Young?

"A. At Mr. Young's home. Mr. Brooks Potter was not there.

"Q. Do you recall the discussion during that period, or discussions during that period?

"A. I feel that I do.

"Q. Were all of these discussions with everyone present, or were there separate conversations?

"A. I think they were all there.

"Q. Do you recall what Mr. Young said on that occasion concerning the proposed acquisition?

"A. I believe that after I told them that I had checked on the advisability of purchasing the shares with the heads of several funds and several friends of mine that I knew that owned them, and some other checks, which I described earlier today, with my cousin in Minneapolis, Clifford Anderson, that I—even though the Investors had this large indebtedness, that I was going on record to recommend the purchase of it, and Mr. Young said, 'Will you please go to the telephone and call up Mr. Kirby and tell him how you feel.'

"Q. Did you do that?

"A. Yes.

"Q. What did Mr. Kirby say to you?

[fol. 810] "A. He said 'Well, I take it, then, that you recommend the purchase of it,' and I said 'That is exactly what I do.'"

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